MISSISSIPPI CODE 1972
Annotated

Civil Practice and Procedure

(§ 11-1-1 to
§ 11-25-119)

Title 11

Digitized by the Internet Archive
in 2021 with funding from
Public.Resource.Org

https://archive.org/details/mississippicode03stat

MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME THREE

CIVIL PRACTICE
AND PROCEDURE

§§ 11-1-1 to 11-25-119

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2019 REGULAR LEGISLATIVE SESSION

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call: 800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters, please call:

Customer Service Department at	800-833-9844
Outside the United States and Canada	518-487-3000
FAX	518-487-3584

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

Your account manager or	800-223-1940
Outside the United States and Canada	518-487-3000

Copyright © 1973—2019
by
THE STATE OF MISSISSIPPI

All rights reserved.

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc. used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

ISBN 978-1-5221-7812-5 (Volume 3)
ISBN 978-0-3270-9628-3 (Code set)

LexisNexis®

Matthew Bender & Company, Inc.

701 E. Water Street, Charlottesville, VA 22902-5389

www.lexisnexis.com

(Pub. 44510)

PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. Summer
Attorney General

PUBLISHER'S FOREWORD

This 2019 Replacement Volume 3 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 1991 Replacement Volume 2, the 2002 Replacement Volume 2, the 2014 Replacement Volume 2, and the 2004 Replacement Volume 3. It also constitutes a record of amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2019 Regular Session.

This volume contains the text of Chapters 1 through 25 of Title 11 of the Mississippi Code of 1972 Annotated, as amended through the 2019 Regular Legislative Session. The remaining Title 11 chapters appear in Volume 3A.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal 2nd Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at http://www.lexisnexis.com for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22906-5389.

September 2019 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Code Service
— Advance Sheets
— Amendment Notes
— Analyses
— Code Status
— Comparable Laws from other States
— Court Rules
— Cross References
— Editor's Notes
— Effective Dates
— Federal Aspects
— History Notes
— Index
— Joint Legislative Committee Notes
— Judicial Decisions
— Opinions of the Attorney General
— Organization and Numbering System
— Placement of Notes
— Replacement Volumes
— Research and Practice References
— Statute Headings
— Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

The history note follows the section text, preceding any other annotations for the section. Information in the history note is listed in chronological order, first by Codes, then by Laws, with the most recent information listed last. If a section has been renumbered, the former number will appear in the history note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

OPINIONS OF THE ATTORNEY GENERAL

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Opinions of the Attorney General."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

GENERAL OUTLINE OF TITLES AND CHAPTERS

Constitution of the United States .... Volume 1
Constitution of Mississippi .... Volume 1

AMENDMENTS

TITLE 1. LAWS AND STATUTES

Beginning Section
Chapter 1. Code of 1972 1-1-1
3. Construction of Statutes 1-3-1
5. Session Laws and Journals 1-5-1

TITLE 3. STATE SOVEREIGNTY, JURISDICTION AND HOLIDAYS

Chapter 1. State Sovereignty Commission [Repealed] 3-1-1
3. State Boundaries, Holidays, and State Emblems 3-3-1
5. Acquisition of Land by United States Government 3-5-1
7. Compact for a Balanced Budget 3-7-1

TITLE 5. LEGISLATIVE DEPARTMENT

Chapter 1. Legislature 5-1-1
3. Legislative Committees 5-3-1
5. Interstate Cooperation 5-5-1
7. Lobbying [Repealed] 5-7-1
8. Lobbying Law Reform Act of 1994 5-8-1
9. Agency Review 5-9-1
11. Abolishment of Agencies 5-11-1

TITLE 7. EXECUTIVE DEPARTMENT

Chapter 1. Governor 7-1-1
3. Secretary of State 7-3-1
5. Attorney General 7-5-1
7. State Fiscal Officer; Department of Audit 7-7-1
9. State Treasurer 7-9-1
11. Secretary of State; Land Records 7-11-1
13. Mississippi Administrative Reorganization Act 7-13-1
15. Executive Branch Reorganization Study Commission [Repealed] 7-15-1

TITLE 7. EXECUTIVE DEPARTMENT (Cont'd)

			Beginning Section
	17.	Mississippi Executive Reorganization Act of 1989	7-17-1

TITLE 9. COURTS

Chapter	1.	Provisions Common to Courts	9-1-1
	3.	Supreme Court	9-3-1
	4.	Court of Appeals of the State of Mississippi	9-4-1
	5.	Chancery Courts	9-5-1
	7.	Circuit Courts	9-7-1
	9.	County Courts	9-9-1
	11.	Justice Courts	9-11-1
	13.	Court Reporters and Court Reporting	9-13-1
	15.	Judicial Council [Repealed]	9-15-1
	17.	Court Administrators	9-17-1
	19.	Commission on Judicial Performance	9-19-1
	21.	Administrative Office of Courts	9-21-1
	23.	Intervention Courts	9-23-1
	25.	Veterans Treatment Courts	9-25-1
	27.	Rivers McGraw Mental Health Diversion Program Act	9-27-1

TITLE 11. CIVIL PRACTICE AND PROCEDURE

Chapter	1.	Practice and Procedure Provisions Common to Courts	11-1-1
	3.	Practice and Procedure in Supreme Court	11-3-1
	5.	Practice and Procedure in Chancery Courts	11-5-1
	7.	Practice and Procedure in Circuit Courts	11-7-1
	9.	Practice and Procedure in County Courts and Justice Courts	11-9-1
	11.	Venue of Actions	11-11-1
	13.	Injunctions	11-13-1
	15.	Arbitration and Award	11-15-1
	17.	Suits to Confirm Title or Interest and to Remove Clouds on Title	11-17-1
	19.	Ejectment	11-19-1
	21.	Partition of Property	11-21-1
	23.	Trial of Right of Property	11-23-1
	25.	Unlawful Entry and Detainer	11-25-1
	27.	Eminent Domain	11-27-1
	29.	Sequestration	11-29-1
	31.	Attachment in Chancery Against Nonresident, Absent or Absconding Debtors	11-31-1

TITLE 11. CIVIL PRACTICE AND PROCEDURE (Cont'd)

Beginning Section
33. Attachment at Law Against Debtors 11-33-1
35. Garnishment 11-35-1
37. Replevin 11-37-1
38. Claim and Delivery 11-38-1
39. Quo Warranto 11-39-1
41. Mandamus; Prohibition 11-41-1
43. Habeas Corpus 11-43-1
44. Compensation to Victims of Wrongful Conviction and Imprisonment 11-44-1
45. Suits by and Against the State or Its Political Subdivisions 11-45-1
46. Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees 11-46-1
47. Lis Pendens 11-47-1
49. Rights and Duties of Attorneys, Generally 11-49-1
51. Appeals 11-51-1
53. Costs 11-53-1
55. Litigation Accountability Act of 1988 11-55-1
57. Structured Settlements 11-57-1
59. Uniform Interstate Depositions and Discovery Act 11-59-1
61. Mississippi Religious Freedom Restoration Act 11-61-1
62. Protecting Freedom of Conscience from Government Discrimination Act 11-62-1
63. Application of Foreign Law 11-63-1
65. Enforcement of Federal Laws, Orders, Rules ... 11-65-1
67. Asbestos Bankruptcy Trust Claims Transparency Act 11-67-1
69. Liability Exemption for Furnishing Information Concerning Insurance Fraud 11-69-1

TITLE 13. EVIDENCE, PROCESS AND JURIES

Chapter 1. Evidence 13-1-1
3. Process, Notice, and Publication 13-3-1
5. Juries 13-5-1
7. State Grand Jury Act 13-7-1

TITLE 15. LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS

Chapter 1. Limitation of Actions 15-1-1
3. Prevention of Frauds 15-3-1

TITLE 17. LOCAL GOVERNMENT; PROVISIONS COMMON TO COUNTIES AND MUNICIPALITIES

Beginning Section

CHAPTER 1. Zoning, Planning and Subdivision Regulation .. 17-1-1
2. Building Codes 17-2-1
3. Promotion of Trade, Conventions and Tourism 17-3-1
5. Jails, Waterworks and Other Improvements 17-5-1
7. Removal of Local Governments in Emergencies 17-7-1
9. Lease of Mineral Lands other than Sixteenth Section or "In Lieu" Lands 17-9-1
11. Gulf Regional District Law 17-11-1
13. Interlocal Cooperation of Governmental Units 17-13-1
15. Human Resource Agencies 17-15-1
17. Solid Wastes Disposal 17-17-1
18. Mississippi Hazardous Waste Facility Siting Act of 1990 17-18-1
19. Appropriations to Planning and Development Districts 17-19-1
21. Finance and Taxation 17-21-1
23. Rural Fire Truck Acquisition Assistance Programs 17-23-1
25. General Provisions Relating to Counties and Municipalities 17-25-1
27. Municipal Historical Hamlet Act 17-27-1
29. Mississippi Entertainment District Act 17-29-1

TITLE 19. COUNTIES AND COUNTY OFFICERS

CHAPTER 1. County Boundaries 19-1-1
2. County Government Reorganization Act 19-2-1
3. Board of Supervisors 19-3-1
4. County Administrator 19-4-1
5. Health, Safety and Public Welfare 19-5-1
7. Property and Facilities 19-7-1
9. Finance and Taxation 19-9-1
11. County Budget 19-11-1
13. Contracts, Claims and Transaction of Business with Counties 19-13-1
15. Records and Recording 19-15-1
17. County Auditors 19-17-1
19. Constables 19-19-1
21. Coroners 19-21-1
23. County Attorneys 19-23-1
25. Sheriffs 19-25-1
27. Surveyors and Surveys 19-27-1

TITLE 19. COUNTIES AND COUNTY OFFICERS (Cont'd)

Beginning Section
29. Local and Regional Railroad Authorities 19-29-1
31. Public Improvement Districts 19-31-1

TITLE 21. MUNICIPALITIES

Chapter 1. Classification, Creation, Abolition, and Expansion 21-1-1
3. Code Charters 21-3-1
5. Commission Form of Government 21-5-1
7. Council Form of Government 21-7-1
8. Mayor-Council Form of Government 21-8-1
9. Council-Manager Plan of Government 21-9-1
11. Municipal Elections [Repealed] 21-11-1
13. Ordinances 21-13-1
15. Officers and Records 21-15-1
17. General Powers 21-17-1
19. Health, Safety, and Welfare 21-19-1
21. Police and Police Departments 21-21-1
23. Municipal Courts 21-23-1
25. Fire Departments and Fire Districts 21-25-1
27. Public Utilities and Transportation 21-27-1
29. Employees' Retirement and Disability Systems 21-29-1
31. Civil Service 21-31-1
33. Taxation and Finance 21-33-1
35. Municipal Budget 21-35-1
37. Streets, Parks and Other Public Property 21-37-1
38. Acquisition or Lease of Real Property from Federal Government for Parks, Recreation, and Tourism 21-38-1
39. Contracts and Claims 21-39-1
41. Special Improvements 21-41-1
43. Business Improvement Districts 21-43-1
45. Tax Increment Financing 21-45-1
47. Delta Natural Gas District 21-47-1

TITLE 23. ELECTIONS

Chapter 1. Qualification of Candidates and Registration of Political Parties [Repealed] 23-1-1
3. Corrupt Practices [Repealed] 23-3-1
5. Registration and Elections [Repealed] 23-5-1
7. Voting Machines and Electronic Voting System [Repealed] 23-7-1

TITLE 23. ELECTIONS (Cont'd)

Beginning Section
9. Absentee Ballot [Repealed] 23-9-1
11. Presidential Election Law [Repealed] 23-11-1
13. Mississippi Presidential Preference Primary and Delegate Selection Law [Repealed] 23-13-1
15. Mississippi Election Code 23-15-1
17. Amendments to Constitution by Voter Initiative 23-17-1

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS

Chapter 1. Public Officers; General Provisions 25-1-1
3. Salaries and Compensation 25-3-1
4. Ethics in Government 25-4-1
5. Removals From Office 25-5-1
7. Fees 25-7-1
9. Statewide Personnel System 25-9-1
11. Social Security and Public Employees' Retirement and Disability Benefits 25-11-1
13. Highway Safety Patrol Retirement System 25-13-1
14. Government Employees Deferred Compensation Plan Law 25-14-1
15. Group Insurance for Public Employees 25-15-1
17. Cafeteria Fringe Benefit Plans 25-17-1
19. Public Employer-Assisted Housing Program 25-19-1
31. District Attorneys 25-31-1
32. Public Defenders 25-32-1
33. Notaries Public 25-33-1
41. Open Meetings 25-41-1
43. Administrative Procedures 25-43-1.101
45. Permit and Licensing Procedures 25-45-1
51. State Depository for Public Documents 25-51-1
53. Mississippi Department of Information Technology Services (MDITS) 25-53-1
55. Lost Records 25-55-1
57. Destruction of Records [Repealed] 25-57-1
58. Geographic Information System 25-58-1
59. Archives and Records Management 25-59-1
60. Local Government Records 25-60-1
61. Public Access to Public Records 25-61-1
62. Disclosure of Personal Information of Section 501(c) Entity 25-62-1
63. Digital Signature Act 25-63-1
65. Agency, University and Community/Junior College Internal Auditing Program 25-65-1

GENERAL OUTLINE

TITLE 27. TAXATION AND FINANCE

			Beginning Section
CHAPTER	1.	Assessors and County Tax Collectors	27-1-1
	3.	Department of Revenue	27-3-1
	4.	Board of Tax Appeals	27-4-1
	5.	Motor Vehicle Comptroller	27-5-1
	7.	Income Tax and Withholding	27-7-1
	8.	Mississippi S Corporation Income Tax Act	27-8-1
	9.	Estate Tax	27-9-1
	10.	Uniform Estate Tax Apportionment Act	27-10-1
	11.	Amusement Tax [Repealed]	27-11-1
	13.	Corporation Franchise Tax	27-13-1
	15.	Statewide Privilege Taxes	27-15-1
	17.	Local Privilege Taxes	27-17-1
	19.	Motor Vehicle Privilege and Excise Taxes	27-19-1
	21.	Finance Company Privilege Tax	27-21-1
	23.	Chain Store Privilege Tax [Repealed]	27-23-1
	25.	Severance Taxes	27-25-1
	27.	Vending and Amusement Machine Taxes	27-27-1
	29.	Ad Valorem Taxes—General Provisions	27-29-1
	31.	Ad Valorem Taxes—General Exemptions	27-31-1
	33.	Ad Valorem Taxes—Homestead Exemptions	27-33-1
	35.	Ad Valorem Taxes—Assessment	27-35-1
	37.	Ad Valorem Taxes—Payments in Lieu of Taxes	27-37-1
	38.	Ad Valorem Taxes—Telecommunications Tax Reform	27-38-1
	39.	Ad Valorem Taxes—State and Local Levies	27-39-1
	41.	Ad Valorem Taxes—Collection	27-41-1
	43.	Ad Valorem Taxes—Notice of Tax Sale to Owners and Lienors	27-43-1
	45.	Ad Valorem Taxes—Redemption of Land Sold for Taxes	27-45-1
	47.	Ad Valorem Taxes—Assignment of Tax Liens	27-47-1
	49.	Ad Valorem Taxes—Insolvencies	27-49-1
	51.	Ad Valorem Taxes—Motor Vehicles	27-51-1
	53.	Ad Valorem Taxes—Mobile Homes	27-53-1
	55.	Gasoline and Motor Fuel Taxes	27-55-1
	57.	Tax on Oils	27-57-1
	59.	Liquefied Compressed Gas Tax	27-59-1
	61.	Interstate Commercial Carriers Motor Fuel Tax	27-61-1
	63.	Motor Vehicle Fueling Centers [Repealed]	27-63-1
	65.	Sales Tax	27-65-1
	67.	Use or Compensating Taxes	27-67-1
	68.	Uniform Sales and Use Tax Administration Law	27-68-1

TITLE 27. TAXATION AND FINANCE (Cont'd)

Beginning Section
69. Tobacco Tax 27-69-1
70. Nonsettling-Manufacturer Cigarette Fee 27-70-1
71. Alcoholic Beverage Taxes 27-71-1
73. Tax Refunds 27-73-1
75. Reciprocal Collection of Taxes 27-75-1
77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the Department of Revenue 27-77-1
101. Annual Reports by Departments of Government, State-Supported Institutions and Taxing Entities 27-101-1
103. State Budget 27-103-1
104. State Fiscal Affairs 27-104-1
105. Depositories 27-105-1
106. Iran Divestment Act of 2015 27-106-1
107. Disaster Relief 27-107-1
109. Cruise Vessels 27-109-1
111. Payment Credit Vouchers as Credit Against Income and Corporation Franchise Tax Liabilities [Repealed effective July 1, 2018] 27-111-1
113. Facilitating Business Rapid Response to State Declared Disasters Act of 2015 27-113-1
115. Alyce G. Clarke Mississippi Lottery Law 27-115-1
117. Israel Support Act of 2019 27-117-1

TITLE 29. PUBLIC LANDS, BUILDINGS AND PROPERTY

CHAPTER 1. Public Lands 29-1-1
3. Sixteenth Section and Lieu Lands 29-3-1
5. Care of Capitol, Old Capitol, State Office Buildings and Executive Mansion 29-5-1
7. Mineral Leases of State Lands 29-7-1
9. Inventories of State Property 29-9-1
11. Energy Conservation in Public Buildings [Repealed] 29-11-1
13. Flood Insurance for State-Owned Buildings 29-13-1
15. Public Trust Tidelands 29-15-1
17. State Agency Repair and Renovation 29-17-4

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS

CHAPTER 1. General Provisions Relative to Public Contracts 31-1-1
3. State Board of Public Contractors 31-3-1
5. Public Works Contracts 31-5-1
7. Public Purchases 31-7-1

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS (Cont'd)

		Beginning Section
8.	Acquisition of Public Buildings, Facilities, and Equipment Through Rental Contracts	31-8-1
9.	Surplus Property Procurement Commission	31-9-1
11.	State Construction Projects	31-11-1
13.	Validation of Public Bonds	31-13-1
15.	Refunding Bonds	31-15-1
17.	State Bonds; Retirement of Bonds	31-17-1
18.	Variable Rate Debt Instruments	31-18-1
19.	Public Debts	31-19-1
21.	Registered Bonds	31-21-1
23.	Mississippi Private Activity Bonds Allocation Act	31-23-1
25.	Mississippi Development Bank Act	31-25-1
27.	Mississippi Bond Refinancing Act	31-27-1
29.	Institute for Technology Development	31-29-1
31.	Mississippi Telecommunications Conference and Training Center	31-31-1

TITLE 33. MILITARY AFFAIRS

Chapter	1.	Definitions and General Provisions Relating to the Military Forces	33-1-1
	3.	Commander in Chief, Military Department, and Governor's Staff	33-3-1
	4.	Mississippi Military Family Relief Fund	33-4-1
	5.	The Militia and Mississippi State Guard	33-5-1
	7.	National Guard	33-7-1
	9.	Property and Finances	33-9-1
	11.	Training Facilities	33-11-1
	13.	Mississippi Code of Military Justice	33-13-1
	15.	Emergency Management and Civil Defense	33-15-1

TITLE 35. WAR VETERANS AND PENSIONS

Chapter	1.	State Veterans Affairs Board	35-1-1
	3.	War Veterans; Miscellaneous Provisions	35-3-1
	5.	Guardianship of Veterans	35-5-1
	7.	Veterans' Home Purchase Law	35-7-1
	9.	Pensions [Repealed]	35-9-1

TITLE 37. EDUCATION

Chapter	1.	State Board of Education	37-1-1
	3.	State Department of Education	37-3-1
	4.	Mississippi Community College Board	37-4-1

TITLE 37. EDUCATION (Cont'd)

		Beginning Section
5.	County Boards of Education and Superintendents	37-5-1
6.	Mississippi Uniform School Law	37-6-1
7.	School Districts; Boards of Trustees of School Districts	37-7-1
9.	District Superintendents, Principals, Teachers, and Other Employees	37-9-1
11.	General Provisions Pertaining to Education	37-11-1
12.	Mississippi Student Religious Liberties Act of 2013	37-12-1
13.	Curriculum; School Year and Attendance	37-13-1
14.	Mary Kirkpatrick Haskell-Mary Sprayberry Public School Nurse Act of 2007	37-14-1
15.	Public Schools; Records, Enrollment and Transfer of Pupils	37-15-1
16.	Statewide Testing Program	37-16-1
17.	Accreditation of Schools	37-17-1
18.	Superior-Performing, Exemplary and School At-Risk Schools Programs	37-18-1
19.	Teacher Compensation	37-19-1
20.	Remedial Education	37-20-1
21.	Early Childhood Education	37-21-1
22.	State Funds for School Districts	37-22-1
23.	Exceptional Children	37-23-1
24.	Mississippi Youth Concussion Law	37-24-1
25.	Driver Education and Training	37-25-1
26.	State Court Education Fund	37-26-1
27.	Agricultural High Schools	37-27-1
28.	Mississippi Charter Schools Act of 2013	37-28-1
29.	Junior Colleges	37-29-1
31.	Vocational Education	37-31-1
33.	Civilian Vocational Rehabilitation	37-33-1
35.	Adult Education	37-35-1
37.	Public Schools; Accounting and Auditing	37-37-1
39.	Public Schools; Purchases	37-39-1
41.	Transportation of Pupils	37-41-1
43.	Textbooks	37-43-1
45.	State Aid to Public Schools	37-45-1
47.	State Aid for Construction of School Facilities	37-47-1
49.	Loans to Students	37-49-1
51.	Financial Assistance to Children Attending Nonsectarian Private Schools	37-51-1
53.	Summer Normals [Repealed]	37-53-1

TITLE 37. EDUCATION (Cont'd)

Beginning Section
55. School Libraries 37-55-1
57. Taxation 37-57-1
59. School Bonds and Obligations 37-59-1
61. Expenditure of School Funds; Budgets 37-61-1
63. Educational Television 37-63-1
65. Closing of Public Schools and Institutions of Higher Learning 37-65-1
67. Distance Learning Collaborative Act of 2016 37-67-1
69. The Energy Academy Act 37-69-1
101. Institutions of Higher Learning; General Provisions 37-101-1
102. Off-campus Instructional Programs 37-102-1
103. Residency and Fees of Students Attending or Applying for Admission to Educational Institutions 37-103-1
104. Mississippi Educational Facilities Authority Act for Private, Nonprofit Institutions of Higher Learning 37-104-1
105. Campuses and Streets of State Institutions of Higher Learning 37-105-1
106. Post-Secondary Education Financial Assistance 37-106-1
107. Scholarships for Children of Deceased or Disabled Law Enforcement Officers or Firemen [Repealed] 37-107-1
108. Scholarships for Children of Prisoners of War or Men Missing in Action 37-108-1
109. Medical Education Loans and Scholarships. [Repealed] 37-109-1
110. Mississippi Public Management Graduate Intern Program 37-110-1
111. Fraternities, Sororities and Other Societies 37-111-1
113. Mississippi State University of Agriculture and Applied Science 37-113-1
115. University of Mississippi 37-115-1
117. Mississippi University for Women 37-117-1
119. University of Southern Mississippi 37-119-1
121. Alcorn State University 37-121-1
123. Delta State University 37-123-1
125. Jackson State University 37-125-1
127. Mississippi Valley State University 37-127-1
129. Nursing Schools and Scholarships 37-129-1
131. Teachers Demonstration and Practice Schools 37-131-1
132. Student Teachers 37-132-1

TITLE 37. EDUCATION (Cont'd)

		Beginning Section
133.	Technical Institutes	37-133-1
135.	Compacts with Other States	37-135-1
137.	School Asbestos Hazard Elimination Act [Repealed]	37-137-1
138.	Asbestos Abatement Accreditation and Certification Act	37-138-1
139.	Mississippi School for Mathematics and Science	37-139-1
140.	Mississippi School of the Arts	37-140-1
141.	The University Research Center Act of 1988	37-141-1
143.	Omnibus Loan or Scholarship Act of 1991	37-143-1
144.	Mississippi Rural Physicians Scholarship Program	37-144-1
145.	Mississippi Opportunity Loan Program Act	37-145-1
146.	Mississippi Rural Dentists Scholarship Program	37-146-1
147.	Mississippi University Research Authority Act	37-147-1
148.	Strengthening Mississippi Academic Research Through Business Act	37-148-1
149.	Mississippi Teacher Center	37-149-1
151.	Mississippi Accountability and Adequate Education Program Act of 1997	37-151-1
152.	Commission on Restructuring the Mississippi Adequate Education Program (MAEP)	37-152-1
153.	Workforce Training and Education Consolidation Act	37-153-1
154.	State Longitudinal Data System	37-154-1
155.	College Savings Plans of Mississippi	37-155-1
157.	Student Tuition Assistance	37-157-1
159.	Mississippi Teacher Scholarship Programs	37-159-1
160.	Teach for America Act	37-160-1
161.	Mississippi Education Reform Act of 2006	37-161-1
163.	Education Achievement Council	37-163-1
165.	Conversion Charter School Act of 2010	37-165-1
167.	New Start School Program [Repealed]	37-167-1
169.	Mississippi Autism Advisory Committee	37-169-1
171.	Use of School Property by Public for Recreation and Sports	37-171-1
173.	Dyslexia Therapy Scholarship for Students with Dyslexia Program	37-173-1
175.	Mississippi Speech-Language Therapy Scholarship for Students with Speech-Language Impairments Program	37-175-1
177.	Literacy-Based Promotion Act	37-177-1

TITLE 37. EDUCATION (Cont'd)

Beginning Section

179. Districts of Innovation 37-179-1
181. Equal Opportunity for Students with Special Needs Act 37-181-1

TITLE 39. LIBRARIES, ARTS, ARCHIVES AND HISTORY

CHAPTER 1. State Law Library; Legislative Reference Bureau 39-1-1
3. Libraries and Library Commission 39-3-1
5. Archives and History 39-5-1
7. Antiquities 39-7-1
9. Trusts to Promote Arts and Sciences 39-9-1
11. Mississippi Arts Commission 39-11-1
13. Historic Preservation Districts and Landmarks 39-13-1
15. Municipal and County Funds to Support the Arts 39-15-1
17. Mississippi Sports Hall of Fame and Dizzy Dean Museum 39-17-1
19. Museum Unclaimed Property Act 39-19-1
21. Mississippi Craft Center 39-21-1
23. Mississippi Children's Museum 39-23-1
25. Mississippi Arts and Entertainment Center 39-25-1
27. Mississippi Blues Commission 39-27-1
29. Mississippi Commission on the Holocaust 39-29-1
31. Mississippi Bicentennial Celebration Commission [Repealed] 39-31-1
32. Mississippi Country and Western Music Commission 39-32-1
33. Mississippi Country Music Trail 39-33-1
35. Mississippi Sesquicentennial of the American Civil War Commission 39-35-1
37. Mississippi Heritage, History and Culture Trail Program 39-37-1
39. Mississippi Civil Rights Museum Advisory Commission 39-39-1

TITLE 41. PUBLIC HEALTH

CHAPTER 1. Mississippi Department of Public Health [Repealed] 41-1-1
3. State Board of Health; Local Health Boards and Officers 41-3-1
4. Department of Mental Health 41-4-1
5. Governing Authorities for State Hospitals and Institutions 41-5-1

TITLE 41. PUBLIC HEALTH (Cont'd)

		Beginning Section
7.	Hospital and Health Care Commissions	41-7-1
9.	Regulation of Hospitals; Hospital Records	41-9-1
10.	Medical Records	41-10-1
11.	State Charity Hospitals; Mississippi Children's Rehabilitation Center	41-11-1
13.	Community Hospitals	41-13-1
15.	Department for the Prevention of Insanity [Repealed]	41-15-1
17.	State Mental Institutions	41-17-1
19.	Facilities and Services for Individuals with an Intellectual Disability or Mental Illness	41-19-1
21.	Individuals with Mental Illness or an Intellectual Disability	41-21-1
22.	Hemophilia	41-22-1
23.	Contagious and Infectious Diseases; Quarantine	41-23-1
24.	Sickle Cell Testing Program	41-24-1
25.	Disinfection and Sanitation of Buildings and Premises	41-25-1
26.	Mississippi Safe Drinking Water Act of 1997 ...	41-26-1
27.	Mosquito Control	41-27-1
28.	Diabetes	41-28-1
29.	Poisons, Drugs and Other Controlled Substances	41-29-1
30.	Alcoholism and Alcohol Abuse Prevention, Control and Treatment	41-30-1
31.	Commitment of Alcoholics and Drug Addicts for Treatment	41-31-1
32.	Commitment of Alcoholics and Drug Addicts to Private Treatment Facilities	41-32-1
33.	Tuberculosis and Respiratory Diseases; Tuberculosis Sanatorium	41-33-1
34.	Health Care Practice Requirements Pertaining to Transmission of Hepatitis B and HIV	41-34-1
35.	Eye Inflammation of Young	41-35-1
36.	Determination of Death	41-36-1
37.	Autopsies	41-37-1
39.	Disposition of Human Bodies or Parts	41-39-1
41.	Surgical or Medical Procedures; Consents	41-41-1
42.	Family Planning	41-42-1
43.	Cemeteries and Burial Grounds	41-43-1
45.	Sexual Sterilization [Repealed]	41-45-1
47.	Transportation and Possession of Parakeets and Other Birds [Repealed]	41-47-1
49.	Regulation of Hotels and Innkeepers	41-49-1

TITLE 41. PUBLIC HEALTH (Cont'd)

		Beginning Section
51.	Animal and Poultry By-Products Disposal or Rendering Plants	41-51-1
53.	Rabies Control in Dogs and Cats	41-53-1
55.	Public Ambulance Service	41-55-1
57.	Vital Statistics	41-57-1
58.	Medical Radiation Technology	41-58-1
59.	Emergency Medical Services	41-59-1
60.	Emergency Medical Technicians — Paramedics — Use of Automated External Defibrillator	41-60-1
61.	State Medical Examiner	41-61-1
63.	Evaluation and Review of Professional Health Services Providers	41-63-1
65.	[Reserved]	
67.	Mississippi Individual On-Site Wastewater Disposal System Law	41-67-1
69.	[Reserved]	
71.	Home Health Agencies	41-71-1
73.	Hospital Equipment and Facilities Authority Act	41-73-1
75.	Ambulatory Surgical Facilities	41-75-1
77.	Licensing of Birthing Centers	41-77-1
79.	Health Problems of School Children	41-79-1
81.	Perinatal Health Care	41-81-1
83.	Utilization Review of Availability of Hospital Resources and Medical Services	41-83-1
85.	Mississippi Hospice Law of 1995	41-85-1
86.	Mississippi Children's Health Care Insurance Program Act	41-86-1
87.	Early Intervention Act for Infants and Toddlers	41-87-1
88.	Mississippi Child Immunization Act of 1994	41-88-1
89.	Infant Mortality Reduction	41-89-1
90.	Hearing Impairment of Infants and Toddlers	41-90-1
91.	Central Cancer Registry	41-91-1
93.	Osteoporosis Prevention and Treatment Education Act	41-93-1
95.	Mississippi Health Policy Act of 1994 [Repealed]	41-95-1
97.	State Employee Wellness and Physical Fitness Programs	41-97-1
99.	Qualified Health Center Grant Program	41-99-1
101.	Mississippi Council on Obesity Prevention and Management	41-101-1
103.	Task Force on Heart Disease and Stroke Prevention	41-103-1
105.	Healthcare Coordinating Council	41-105-1

TITLE 41. PUBLIC HEALTH (Cont'd)

Beginning Section
107. Health Care Rights of Conscience 41-107-1
109. Leonard Morris Chronic Kidney Disease Leadership Task Force 41-109-1
111. Child Death Review Panel 41-111-1
112. Maternal Mortality Review Committee 41-112-1
113. Tobacco Education, Prevention and Cessation Program 41-113-1
114. Restrictions on Tobacco Use in Public Facilities 41-114-1
115. Tanning Facilities 41-115-1
117. Nurse-Family Partnership Pilot Program 41-117-1
119. Health Information Technology Act 41-119-1
121. Requirements for Advertisements for Health Care Services 41-121-1
123. Office of Mississippi Physician Workforce 41-123-1
125. Prescribed Pediatric Extended Care Centers (PPEC) 41-125-1
127. Telemedicine Services 41-127-1
129. Umbilical Cord Blood Banking Program Act 41-129-1
131. Right to Try Act 41-131-1
133. Lay Caregivers for Hospital Patients 41-133-1
135. Support and Promotion of Breast-Feeding in Mississippi 41-135-1

TITLE 43. PUBLIC WELFARE

CHAPTER 1. Department of Human Services and County Departments of Public Welfare 43-1-1
3. Blind Persons 43-3-1
5. Schools for the Blind and Deaf 43-5-1
6. Rights and Liabilities of Persons with Disabilities 43-6-1
7. Council on Aging 43-7-1
9. Old Age Assistance 43-9-1
11. Institutions for the Aged or Infirm 43-11-1
12. Medicaid and Human Services Transparency and Fraud Prevention Act 43-12-1
13. Medical Assistance for the Aged; Medicaid 43-13-1
14. Mississippi Statewide System of Care for Children and Youth 43-14-1
15. Child Welfare 43-15-1
16. Child Residential Home Notification Act 43-16-1
17. Temporary Assistance to Needy Families 43-17-1
18. Interstate Compact on the Placement of Children 43-18-1

TITLE 43. PUBLIC WELFARE (Cont'd)

Beginning Section
19. Support of Natural Children 43-19-1
20. Child Care Facilities 43-20-1
21. Youth Court 43-21-1
23. Family Courts [Repealed] 43-23-1
24. State Central Registry of Child Abuse Reports; Wide Area Telephone Service for Reporting Child Abuse [Repealed] 43-24-1
25. Interstate Compacts Relating to Juveniles 43-25-1
26. Department of Child Protection Services 43-26-1
27. Department of Youth Services 43-27-1
28. Mississippi Achieving a Better Life Experience (ABLE) Act 43-28-1
29. Persons with Disabilities 43-29-1
30. Mississippi Disability Resource Commission 43-30-1
31. Poor Persons 43-31-1
33. Housing and Housing Authorities 43-33-1
35. Urban Renewal and Redevelopment 43-35-1
37. Acquisition of Real Property Using Public Funds 43-37-1
39. Relocation Assistance 43-39-1
41. Emergency and Disaster Assistance [Repealed] 43-41-1
43. Administration of Social Security Funds 43-43-1
45. Adult Protective Services [Repealed] 43-45-1
47. Mississippi Vulnerable Persons Act 43-47-1
49. Mississippi Welfare Restructuring Program Act of 1993 [Repealed] 43-49-1
51. Family Preservation Act of 1994 43-51-1
53. Mississippi Leadership Council on Aging 43-53-1
55. Mississippi Commission for National and Community Service 43-55-1
57. Comprehensive Plan for Provision of Services to Disabled Persons [Repealed]
59. Mississippi Commission on the Status of Women 43-59-1
61. Mississippi Seniors and Indigents Rx Program 43-61-1

TITLE 45. PUBLIC SAFETY AND GOOD ORDER

Chapter
1. Department of Public Safety 45-1-1
2. Law Enforcement Officers and Fire Fighters Death and Disability Benefits Trust Funds 45-2-1
3. Highway Safety Patrol 45-3-1
4. County Jail Officers Training Program 45-4-1
5. Law Enforcement Officers' Training Academy 45-5-1
6. Law Enforcement Officers Training Program 45-6-1

TITLE 45. PUBLIC SAFETY AND GOOD ORDER (Cont'd)

Beginning Section
7. County Patrol Officers 45-7-1
9. Weapons 45-9-1
10. Novelty Lighters 45-10-1
11. Fire Protection Regulations, Fire Protection and Safety in Buildings 45-11-1
12. Mississippi Fire Safety Standard and Firefighter Protection Act [For contingent repeal of this chapter, see § 45-12-21] 45-12-1
13. Fireworks and Explosives 45-13-1
14. Radiation Protection Program 45-14-1
15. High Voltage Power Lines 45-15-1
17. Civil Emergencies 45-17-1
18. Emergency Management Assistance Compact .. 45-18-1
19. Subversive Groups and Subversive Activities ... 45-19-51
21. Rock Festivals 45-21-1
23. Boiler and Pressure Vessel Safety 45-23-1
25. Identification Cards for Non-Drivers. [Repealed] 45-25-1
27. Mississippi Justice Information Center 45-27-1
29. Records 45-29-1
31. Sex Offense Criminal History Record Information Act 45-31-1
33. Registration of Sex Offenders 45-33-1
35. Identification Cards 45-35-1
37. Prevention of Youth Access to Tobacco Act 45-37-1
39. Statewide Crime Stoppers Advisory Council 45-39-1
41. Mississippi Silver Alert System 45-41-1
43. William Lee Montjoy Pool Safety Act 45-43-1
45. Mississippi Conveyance Safety Act 45-45-1
47. DNA Data Bank 45-47-1

TITLE 47. PRISONS AND PRISONERS; PROBATION AND PAROLE

CHAPTER 1. County and Municipal Prisons and Prisoners .. 47-1-1
3. Removal of Prisoners 47-3-1
4. Privately Operated Correctional Facilities 47-4-1
5. Correctional System 47-5-1
7. Probation and Parole 47-7-1

TITLE 49. CONSERVATION AND ECOLOGY

CHAPTER 1. General Provisions 49-1-1
2. Department of Environmental Quality 49-2-1
3. Fisheries and Wildlife Research 49-3-1

TITLE 49. CONSERVATION AND ECOLOGY (Cont'd)

Beginning Section

4. Mississippi Department of Wildlife, Fisheries and Parks 49-4-1
5. Fish, Game and Bird Protection and Refuges ... 49-5-1
6. Motor Vehicle and Boat Replacement Program 49-6-1
7. Hunting and Fishing 49-7-1
8. Importation, Sale and Possession of Inherently Dangerous Wild Animals 49-8-1
9. Mussels 49-9-1
10. Wildlife Violator Compact 49-10-1
11. Private Shooting Preserves 49-11-1
13. Commercial Quail 49-13-1
15. Seafood 49-15-1
17. Pollution of Waters, Streams, and Air 49-17-1
18. Mississippi Liability of Persons Responding to Oil Spills Act 49-18-1
19. Forests and Forest Protection 49-19-1
20. Mississippi River Timberlands Control Act [Repealed] 49-20-1
21. Interstate Environmental Compact 49-21-1
23. Outdoor Advertising 49-23-1
25. Junkyards 49-25-1
26. Channel Maintenance Act 49-26-1
27. Coastal Wetlands Protection Act 49-27-1
28. Shoreline and Beach Preservation Districts 49-28-1
29. Environmental Protection Council [Repealed] .. 49-29-1
31. Mississippi Multimedia Pollution Prevention Act 49-31-1
33. Mississippi Agricultural and Forestry Activity Act 49-33-1
35. Mississippi Brownfields Voluntary Cleanup and Redevelopment; Remediation of Property on National Priorities List 49-35-1
37. Statewide Scientific Information Management 49-37-1

TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL

Chapter 1. Navigable Waters 51-1-1
2. Mississippi Marine Litter Act 51-2-1
3. Water Resources; Regulation and Control 51-3-1
4. Mississippi Scenic Streams Stewardship Act ... 51-4-1
5. Subsurface Waters; Well Drillers 51-5-1
7. Water Management Districts 51-7-1
8. Joint Water Management Districts 51-8-1

TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL (Cont'd)

Beginning Section

9. Development of Region Bordering Pearl River; Pearl River Valley Water Supply District; Metropolitan Area Water Supply Act 51-9-1
11. Pearl River Basin Development District [Repealed] 51-11-1
13. Tombigbee Valley Authority and Water Management District 51-13-1
15. Pat Harrison Waterway Commission and District 51-15-1
17. Big Black River Basin District 51-17-1
19. West Central Mississippi Waterway Commission [Repealed] 51-19-1
21. Lower Mississippi River Basin Development District [Repealed] 51-21-1
23. Lower Yazoo River Basin District. [Repealed] .. 51-23-1
25. Yellow Creek Watershed Authority 51-25-1
27. Tennessee-Tombigbee Waterway Compact 51-27-1
29. Drainage Districts with Local Commissioners 51-29-1
31. Drainage Districts with County Commissioners 51-31-1
33. Provisions Common to Drainage Districts and Swamp Land Districts 51-33-1
35. Flood Control 51-35-1
37. Watershed Districts 51-37-1
39. Storm Water Management Districts 51-39-1
41. Public Water Authorities 51-41-1

TITLE 53. OIL, GAS, AND OTHER MINERALS

CHAPTER 1. State Oil and Gas Board 53-1-1
3. Development, Production and Distribution of Gas and Oil 53-3-1
5. Geological and Mineral Survey 53-5-1
7. Surface Mining and Reclamation of Land 53-7-1
9. Surface Coal Mining and Reclamation of Land 53-9-1
10. Interstate Mining Compact 53-10-1
11. Mississippi Geologic Sequestration of Carbon Dioxide Act 53-11-1

TITLE 55. PARKS AND RECREATION

CHAPTER 1. Mississippi Recreational Advisory Council [Repealed] 55-1-1
3. State Parks and Forests 55-3-1

TITLE 55. PARKS AND RECREATION (Cont'd)

Beginning Section

5. Federal Parks and National Parkways 55-5-1
7. Bridge and Park Commissions 55-7-1
9. County and Municipal Facilities 55-9-1
11. Harrison County Parkway 55-11-1
13. Natchez Trace Parkway 55-13-1
15. Commemorative Parks and Monuments 55-15-1
17. International Gardens of Mississippi 55-17-1
19. Bienville Recreational District 55-19-1
21. Mississippi Zoological Park and Garden Districts 55-21-1
23. Mississippi Veterans Memorial Stadium 55-23-1
24. Mississippi Coast Coliseum Commission 55-24-1
25. Rails-to-Trails Recreational District 55-25-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT

Chapter 1. Mississippi Development Authority 57-1-1
3. Agriculture and Industry Program 57-3-1
4. Industrial Development Fund 57-4-1
5. Industrial Parks and Districts 57-5-1
7. Sale or Development of Airport Lands, or Other Lands, for Industrial Purposes 57-7-1
9. Industrial Plant Training 57-9-1
10. Small Business Assistance 57-10-1
11. Market and Industrial Studies and Research ... 57-11-1
13. Research and Development Center 57-13-1
15. Marine Resources 57-15-1
17. Forest Products Utilization Laboratory [Repealed] 57-17-1
18. Renewable Natural Resources Research Act of 1994 57-18-1
19. Food Technology Laboratory 57-19-1
21. State Chemical Laboratory 57-21-1
23. Pharmaceutical Product Development and Utilization 57-23-1
25. Southern States Energy Compact 57-25-1
26. Tourism Project Incentive Program; Theme Parks, Entertainment Centers, Scenic Attractions, etc. 57-26-1
27. Regional Tourist Promotion Councils 57-27-1
28. Tourism Project Incentive Program; Entertainment Districts, etc. 57-28-1
29. Travel and Tourism 57-29-1
30. Family-Oriented Enterprises 57-30-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

Beginning Section

31. County Industrial Development Authorities 57-31-1
32. Southeast Mississippi Industrial Council 57-32-1
33. Southern Growth Policies Agreement 57-33-1
34. Alabama-Mississippi Joint Economic Development Authority 57-34-1
35. Tennessee River Valley Association 57-35-1
36. Chickasaw Trail Economic Development Compact [Repealed] 57-36-1
37. Transportation Planning Council [Repealed] 57-37-1
39. Energy and Transportation Planning 57-39-1
40. Energy Infrastructure Revolving Loan Program 57-40-1
41. Financing Industrial Enterprise Projects 57-41-1
43. Railroad Revitalization 57-43-1
44. Local Governments Freight Rail Service Projects 57-44-1
45. Mississippi-Louisiana-Alabama Rapid Rail Transit Compact 57-45-1
46. Mississippi Railroad Improvements Fund 57-46-1
47. Southeast Interstate Low-Level Radioactive Waste Management Compact 57-47-1
49. Nuclear Waste Storage and Disposal 57-49-1
51. Enterprise Zones [Repealed] 57-51-1
53. Corporate Headquarters Incentive Program [Repealed] 57-53-1
54. Advanced Technology Initiative [Repealed] 57-54-1
55. Universities Research Institutes 57-55-1
56. Mississippi Technology Transfer Office 57-56-1
57. Export Trade Development 57-57-1
59. Mississippi Capital Companies [Repealed] 57-59-1
61. Mississippi Business Investment Act 57-61-1
62. Mississippi Advantage Jobs Act 57-62-1
63. Statewide Economic Development and Planning Act 57-63-1
64. Regional Economic Development 57-64-1
65. Mississippi International Trade Institute 57-65-1
67. Mississippi Superconducting Super Collider Act 57-67-1
69. Mississippi Minority Business Enterprise Act .. 57-69-1
71. Mississippi Small Enterprise Development Finance Act 57-71-1
73. Economic Development Reform Act 57-73-1
75. Mississippi Major Economic Impact Act 57-75-1
77. Venture Capital Act of 1994 57-77-1
79. Mississippi Small Town Development Act 57-79-1
80. Growth and Prosperity Act 57-80-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

Beginning Section
81. Mississippi Science and Technology Commission [Repealed] ... 57-81-1
83. Mississippi Technology, Inc. Liaison Committee 57-83-1
85. Mississippi Rural Impact Act ... 57-85-1
87. Mississippi Broadband Technology Development Act ... 57-87-1
89. Mississippi Motion Picture Incentive Act ... 57-89-1
91. Economic Redevelopment Act ... 57-91-1
93. Mississippi Existing Industry Productivity Loan Program ... 57-93-1
95. Mississippi Job Protection Act ... 57-95-1
97. Mississippi Delta Revitalization Act of 2006 ... 57-97-1
99. Mississippi Major Economic Impact Withholding Rebate Incentive Program ... 57-99-1
100. Existing Industry Withholding Rebate Incentive Program ... 57-100-1
101. Mississippi Major Economic Impact Authority Component Construction Material Costs Rebate Program ... 57-101-1
103. Technology Based Business Capital Assistance Programs ... 57-103-1
105. Qualified Equity Investment Tax Credits and Public Entity Financing Arrangements ... 57-105-1
107. Mississippi Workforce Training Projects ... 57-107-1
111. Mississippi Small Business and Existing Forestry Industry Enterprise Participating Loan Program ... 57-111-1
113. Business Enterprise Tax Exemptions ... 57-113-1
115. Mississippi Small Business Investment Company Act ... 57-115-1
117. Mississippi Health Care Industry Zone Act [Repealed effective July 1, 2022] ... 57-117-1

TITLE 59. PORTS, HARBORS, LANDINGS AND WATERCRAFT

CHAPTER 1. Harbor or Port Commissions; Powers of Political Subdivision; Pilotage ... 59-1-1
3. Ports of Entry ... 59-3-1
5. State Ports and Harbors ... 59-5-1
6. Compact for Development of Deep Draft Harbor and Terminal ... 59-6-1
7. County and Municipal Harbors ... 59-7-1
9. County Port Authority or Development Commission ... 59-9-1

TITLE 59. PORTS, HARBORS, LANDINGS AND WATERCRAFT (Cont'd)

Beginning Section
11. County Port and Harbor Commission 59-11-1
13. Harbor Improvements by Coast Counties 59-13-1
15. Small Craft Harbors 59-15-1
17. State Inland Ports 59-17-1
19. Landings 59-19-1
21. Boats and Other Vessels 59-21-1
23. Alcohol Boating Safety Act 59-23-1
25. Certificates of Title for Boats and Other Vessels 59-25-1

TITLE 61. AVIATION

CHAPTER 1. Transportation Commission 61-1-1
3. Airport Authorities 61-3-1
4. Mississippi Wayport Authority Act 61-4-1
5. Acquisition, Disposition and Support of Airport Facilities 61-5-1
7. Airport Zoning 61-7-1
9. Incorporation of Airport Into Corporate Boundaries of Municipality 61-9-1
11. Operation of Aircraft; Certification and Licensing of Pilots and Aircraft 61-11-1
13. Aircraft for Use of Governor, State Departments and Agencies 61-13-1
15. Registration of Aircraft 61-15-1
17. Concealing or Misrepresenting Aircraft Identification Number; Non-Conforming Aircraft Fuel Containers 61-17-1
19. Aviation Hazards 61-19-1

TITLE 63. MOTOR VEHICLES AND TRAFFIC REGULATIONS

CHAPTER 1. Driver's License 63-1-1
2. Mandatory Use of Safety Seat Belts 63-2-1
3. Traffic Regulations and Rules of the Road 63-3-1
5. Size, Weight and Load 63-5-1
7. Equipment and Identification 63-7-1
9. Traffic Violations Procedure 63-9-1
10. Nonresident Traffic Violator Compact 63-10-1
11. Implied Consent Law 63-11-1
13. Inspection of Motor Vehicles 63-13-1
15. Motor Vehicle Safety — Responsibility 63-15-1
16. Public Safety Verification and Enforcement Act [Repealed effective July 1, 2022] 63-16-1

TITLE 63. MOTOR VEHICLES AND TRAFFIC REGULATIONS (Cont'd)

		Beginning Section
17.	Manufacture, Sales and Distribution	63-17-1
19.	Motor Vehicle Sales Finance Law	63-19-1
21.	Motor Vehicle Titles	63-21-1
23.	Abandoned Motor Vehicles	63-23-1
25.	Motor Vehicle Chop Shop, Stolen and Altered Property Act	63-25-1
27.	Disclosure of Use of Nonoriginal Replacement Parts	63-27-1
29.	Mississippi Vehicle Protection Product Act	63-29-1
31.	Operating Off-Road Vehicles	63-31-1
33.	Miscellaneous Provisions	63-33-1

TITLE 65. HIGHWAYS, BRIDGES AND FERRIES

CHAPTER		
1.	Transportation Department	65-1-1
2.	State Transportation Arbitration Board	65-2-1
3.	State Highway System	65-3-1
4.	Economic Development Highway Act	65-4-1
5.	Controlled Access Facilities	65-5-1
7.	Public Roads and Streets; Private Way	65-7-1
9.	State Aid Roads in Counties	65-9-1
10.	County Major Feeder Road System [Repealed]	65-10-1
11.	County Highway Aid	65-11-1
13.	Highway and Street Revenue Bond Authority	65-13-1
15.	County Funds for Roads and Bridges	65-15-1
17.	County Road Officials	65-17-1
18.	Local System Road Program	65-18-1
19.	Separate Road Districts	65-19-1
21.	Bridges; General Provisions	65-21-1
23.	Bridges; Boundary and Other Waters	65-23-1
25.	Mississippi River Bridges	65-25-1
26.	Tennessee-Tombigbee Waterway Bridges	65-26-1
27.	Ferries; General Provisions	65-27-1
29.	Ferries in Certain Counties	65-29-1
31.	Hospitality Stations on Highways	65-31-1
33.	Sea Walls	65-33-1
37.	Local System Bridge Replacement and Rehabilitation Program	65-37-1
39.	Gaming Counties Bond Sinking Fund	65-39-1
41.	Mississippi Scenic Byways	65-41-1
43.	Toll Roads and Toll Bridges	65-43-1

TITLE 67. ALCOHOLIC BEVERAGES

			Beginning Section
CHAPTER	1.	Local Option Alcoholic Beverage Control	67-1-1
	3.	Sale of Light Wine, Beer, and Other Alcoholic Beverages	67-3-1
	5.	Native Wines	67-5-1
	7.	Beer Industry Fair Dealing Act	67-7-1
	9.	Possession or Transportation of Alcoholic Beverages, Light Wine, or Beer	67-9-1

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS

CHAPTER	1.	Agriculture and Commerce Department; Council on Agriculture	69-1-1
	2.	Mississippi Farm Reform Act	69-2-1
	3.	Agricultural Seeds	69-3-1
	5.	Fairs; Stock Shows; Improvement of Livestock	69-5-1
	7.	Markets and Marketing; Domestic Fish Farming	69-7-1
	8.	Beef Promotion And Research Program	
	9.	Soybean Promotion Board	69-9-1
	10.	Rice Promotion Board	69-10-1
	11.	Swine	69-11-1
	13.	Stock Laws, Estrays	69-13-1
	15.	Board of Animal Health; Livestock and Animal Diseases	69-15-1
	17.	Livestock Biologics, Drugs and Vaccines	69-17-1
	19.	Regulation of Professional Services	69-19-1
	21.	Crop Spraying and Licensing of Aerial Applicators	69-21-1
	23.	Mississippi Pesticide Law	69-23-1
	24.	Fertilizing Materials and Additives	69-24-1
	25.	Plants, Plant and Bee Diseases	69-25-1
	26.	Pest Control Compact	69-26-1
	27.	Soil Conservation	69-27-1
	28.	Protection and Conservation of Agricultural Lands	69-28-1
	29.	Livestock Brands, Theft or Loss of Livestock and Protective Associations	69-29-1
	31.	Regulation of Moisture-Measuring Devices	69-31-1
	33.	Pecan Harvesting	69-33-1
	34.	Milk Producers Transportation Cost Assistance Loan Program	69-34-1
	35.	Mississippi Dairy Promotion Act	69-35-1
	36.	Southern Dairy Compact	69-36-1
	37.	Mississippi Boll Weevil Management Act	69-37-1

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS (Cont'd)

Beginning Section

39. Agricultural Liming Materials 69-39-1
41. Mississippi Agribusiness Council Act of 1993 ... 69-41-1
42. Program to Encourage Growth in Mississippi Agribusiness Industry 69-42-1
43. Mississippi Ratite Council and Promotion Board 69-43-1
44. Mississippi Corn Promotion Board 69-44-1
45. Mississippi Agricultural Promotions Program Act 69-45-1
46. Mississippi Land, Water and Timber Resources Act 69-46-1
47. Organic Certification Program 69-47-1
48. Peanut Promotion Board 69-48-1
49. Field Crop Products 69-49-1
51. Ethanol, Anhydrous Alcohol and Wet Alcohol ... 69-51-1
53. Agritourism 69-53-1

TITLE 71. LABOR AND INDUSTRY

Chapter 1. Employer and Employee 71-1-1
3. Workers' Compensation 71-3-1
5. Unemployment Compensation 71-5-1
7. Drug and Alcohol Testing of Employees 71-7-1
9. Medical Savings Account Act 71-9-1
11. Employment Protection Act 71-11-1
13. Prohibition Against Employer Intimidation Act 71-13-1
15. Mississippi Employment Fairness Act 71-15-1

TITLE 73. PROFESSIONS AND VOCATIONS

Chapter 1. Architects 73-1-1
2. Landscape Architectural Practice 73-2-1
3. Attorneys at Law 73-3-1
4. Auctioneers 73-4-1
5. Barbers 73-5-1
6. Chiropractors 73-6-1
7. Cosmetologists 73-7-1
9. Dentists 73-9-1
10. Dietitians 73-10-1
11. Practice of Funeral Service and Funeral Directing 73-11-1
13. Engineers and Land Surveyors 73-13-1
14. Hearing Aid Dealers 73-14-1
15. Nurses 73-15-1

TITLE 73. PROFESSIONS AND VOCATIONS (Cont'd)

Beginning Section
17. Nursing Home Administrators 73-17-1
19. Optometry and Optometrists 73-19-1
21. Pharmacists 73-21-1
22. Orthotics and Prosthetics 73-22-1
23. Physical Therapists 73-23-1
24. Mississippi Occupational Therapy Practice Act 73-24-1
25. Physicians 73-25-1
26. Physician Assistants 73-26-1
27. Podiatrists 73-27-1
29. Polygraph Examiners 73-29-1
30. Licensed Professional Counselors 73-30-1
31. Psychologists 73-31-1
33. Public Accountants 73-33-1
34. Real Estate Appraisers 73-34-1
35. Real Estate Brokers 73-35-1
36. Registered Foresters 73-36-1
37. Sanitarians 73-37-1
38. Speech Pathologists and Audiologists 73-38-1
39. Veterinarians 73-39-1
41. Athlete Agents [Repealed] 73-41-1
42. Uniform Athlete Agents Law 73-42-1
43. State Board of Medical Licensure 73-43-1
45. Information to Be Included in Prescriptions 73-45-1
47. Occupational Board Compliance Act of 2017 73-47-1
49. Health Care Provider Licensing Boards 73-49-1
50. Licensing, Certifying or Registering Military-trained Individuals or Spouses to Lawfully Practice Occupation 73-50-1
51. Unlicensed Practice of Profession 73-51-1
52. Licensure Records 73-52-1
53. Licensing and Regulation of Social Workers 73-53-1
54. Marriage and Family Therapists 73-54-1
55. Mississippi Athletic Trainers Licensure Act 73-55-1
57. Mississippi Respiratory Care Practice Act 73-57-1
59. Residential Builders and Remodelers 73-59-1
60. Home Inspectors 73-60-1
61. Tattooing and Body Piercing 73-61-1
63. Registered Professional Geologists Practice Act 73-63-1
65. Professional Art Therapists 73-65-1
67. Professional Massage Therapists 73-67-1
69. Mississippi Electronic Protection Licensing Act 73-69-1
71. Acupuncture Practice Act 73-71-1
73. Mississippi Certified Interior Designer Act 73-73-1

TITLE 73. PROFESSIONS AND VOCATIONS (Cont'd)

Beginning Section
75. Licensed Behavior Analysts 73-75-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS

CHAPTER 1. Uniform Commercial Code — Revised Article 1. General Provisions 75-1-101
2. Uniform Commercial Code — Sales 75-2-101
2A. Uniform Commercial Code — Leases 75-2A-101
3. Uniform Commercial Code — Negotiable Instruments 75-3-101
4. Uniform Commercial Code—Bank Deposits and Collections 75-4-101
4A. Uniform Commercial Code—Funds Transfers .. 75-4A-101
5. Uniform Commercial Code—Revised Article 5. Letters of Credit 75-5-101
6. Uniform Commercial Code—Bulk Transfers 75-6-101
7. Uniform Commercial Code—Documents of Title 75-7-101
8. Uniform Commercial Code—Revised Article 8. Investment Securities 75-8-101
9. Uniform Commercial Code—Secured Transactions 75-9-101
10. Uniform Commercial Code—Effective Date and Repealer 75-10-101
11. Uniform Commercial Code—Effective Date and Transition Provisions: 1977 Amendments 75-11-101
12. Uniform Electronic Transactions Act 75-12-1
13. Bills, Notes and Other Writings 75-13-1
15. Mississippi Money Transmitters Act 75-15-1
17. Interest, Finance Charges, and Other Charges 75-17-1
18. Revolving Charge Agreements; Credit Cards [Repealed] 75-18-1
19. Seals 75-19-1
21. Trusts and Combines in Restraint or Hindrance of Trade 75-21-1
23. Fair Trade Laws 75-23-1
24. Regulation of Business for Consumer Protection 75-24-1
25. Registration of Trademarks and Labels 75-25-1
26. Mississippi Uniform Trade Secrets Act 75-26-1
27. Weights and Measures 75-27-1
29. Sale and Inspection of Food and Drugs 75-29-1
31. Milk and Milk Products 75-31-1
33. Meat, Meat-Food and Poultry Regulation and Inspection 75-33-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

		Beginning Section
35.	Meat Inspection	75-35-1
37.	Operation of Frozen Food Locker Plants [Repealed]	75-37-1
39.	Sale of Baby Chicks	75-39-1
40.	Importation and Sale of Animals or Birds	75-40-1
41.	Gins	75-41-1
43.	Farm Warehouses	75-43-1
44.	Grain Warehouses	75-44-1
45.	Commercial Feeds and Grains	75-45-1
47.	Commercial Fertilizers	75-47-1
49.	Factory-Built Homes	75-49-1
51.	Water Heaters	75-51-1
53.	Paints, Varnishes and Similar Materials	75-53-1
55.	Gasoline and Petroleum Products	75-55-1
56.	Antifreeze and Summer Coolants	75-56-1
57.	Liquefied Petroleum Gases	75-57-1
58.	Mississippi Natural Gas Marketing Act	75-58-1
59.	Correspondence Courses	75-59-1
60.	Proprietary Schools and Colleges	75-60-1
61.	Manufacture and Sale of Jewelry and Optical Equipment	75-61-1
63.	Sales of Cemetery Merchandise and Funeral Services	75-63-1
65.	Going Out of Business Sales; Unsolicited Goods	75-65-1
66.	Home Solicitation Sales	75-66-1
67.	Loans	75-67-1
69.	Farm Loan Bonds	75-69-1
71.	Mississippi Securities Act of 2010	75-71-101
72.	Business Takeovers	75-72-1
73.	Hotels and Innkeepers	75-73-1
74.	Youth Camps	75-74-1
75.	Amusements, Exhibitions and Athletic Events	75-75-1
76.	Mississippi Gaming Control Act	75-76-1
77.	Repurchase of Inventories From Retailers Upon Termination of Contract	75-77-1
79.	Pulpwood Scaling and Practices	75-79-1
81.	Dance Studio Lessons	75-81-101
83.	Health Spas	75-83-1
85.	Transient Vendor	75-85-1
87.	Contracts Between Out-of-State Principals and Commissioned Sales Representatives	75-87-1
89.	Mississippi Commodities Enforcement Act	75-89-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

		Beginning Section
91.	Truth in Music Advertising	75-91-1
93.	Fictitious Business Name Registration Act	75-93-1
95.	Business of Purchasing Precious Items for Resale	75-95-1

TITLE 77. PUBLIC UTILITIES AND CARRIERS

CHAPTER			
	1.	Public Service Commission	77-1-1
	2.	Public Utilities Staff	77-2-1
	3.	Regulation of Public Utilities	77-3-1
	5.	Electric Power	77-5-1
	6.	Municipal Gas Authority of Mississippi Law	77-6-1
	7.	Motor Carriers	77-7-1
	8.	Transportation Network Companies	77-8-1
	9.	Railroads and Other Common Carriers	77-9-1
	11.	Gas Pipelines and Distribution Systems	77-11-1
	13.	Regulation of Excavations Near Underground Utility Facilities	77-13-1
	15.	Local Natural Gas Districts	77-15-1
	17.	Mississippi Broadband Enabling Act	77-17-1

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS

CHAPTER			
	1.	General Provisions Relative to Corporations	79-1-1
	3.	Business Corporations [Repealed]	79-3-1
	4.	Mississippi Business Corporation Act	79-4-1.01
	5.	Business Development Corporations [Repealed]	79-5-1
	6.	Foreign Limited Liability Companies [Repealed]	79-6-1
	7.	Small Business Investment Companies	79-7-1
	9.	Professional Corporations [Repealed]	79-9-1
	10.	Mississippi Professional Corporation Act	79-10-1
	11.	Nonprofit, Nonshare Corporations and Religious Societies	79-11-1
	12.	Partnerships [Repealed]	79-12-1
	13.	Uniform Partnership Act (1997)	79-13-101
	14.	Mississippi Uniform Limited Partnership Act	79-14-101
	15.	Investment Trusts	79-15-1
	16.	Mississippi Registration of Foreign Business Trusts Act	79-16-1
	17.	Agricultural Associations; Conversion to Corporate Form	79-17-1

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS (Cont'd)

		Beginning Section
19.	Agricultural Cooperative Marketing Associations	79-19-1
21.	Aquatic Products Marketing Association	79-21-1
22.	Mississippi Aquaculture Act of 1988	79-22-1
23.	Commercial and Proprietary Information	79-23-1
25.	Mississippi Shareholder Protection Act	79-25-1
27.	Mississippi Control Share Act	79-27-1
29.	Revised Mississippi Limited Liability Company Act	79-29-101
31.	Mississippi Registration of Foreign Limited Liability Partnerships Act [Repealed]	79-31-1
33.	Corporate Successor Asbestos-Related Liability in Connection with Mergers or Consolidations	79-33-1
35.	The Mississippi Registered Agents Act	79-35-1
37.	Mississippi Entity Conversion and Domestication Act	79-37-101

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS

CHAPTER	1.	Department of Banking and Consumer Finance	81-1-1
	3.	Incorporation and Organization of Banks	81-3-1
	5.	General Provisions Relating to Banks and Banking	81-5-1
	7.	Branch Banks	81-7-1
	8.	Regional Banking Institutions	81-8-1
	9.	Insolvent Banks	81-9-1
	11.	Savings and Loan Associations [Repealed]	81-11-1
	12.	Savings Associations Law	81-12-1
	13.	Credit Unions	81-13-1
	14.	Savings Bank Law	81-14-1
	15.	Mississippi Rural Credit Law	81-15-1
	17.	Farmers' Credit Associations	81-17-1
	18.	Mississippi S.A.F.E. Mortgage Act	81-18-1
	19.	Consumer Loan Broker Act	81-19-1
	20.	Consumer Complaints and Disputes Against Mortgage Companies	81-20-1
	21.	Insurance Premium Finance Companies	81-21-1
	22.	Mississippi Debt Management Services Act	81-22-1
	23.	Interstate Bank Branching	81-23-1
	25.	The Mississippi International Banking Act	81-25-1
	27.	Multistate, State and Limited Liability Trust Institutions	81-27-1.001

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS (Cont'd)

Beginning Section

29. Lender Trade Name and Trademark Use 81-29-1

TITLE 83. INSURANCE

CHAPTER 1. Department of Insurance 83-1-1

2. Competitive Rating for Property and Casualty Insurance 83-2-1

3. Commissioner of Insurance, Rating Bureau and Rates 83-3-1

5. General Provisions Relative to Insurance and Insurance Companies 83-5-1

6. Registration and Examination of Insurers 83-6-1

7. Life Insurance 83-7-1

9. Accident, Health and Medicare Supplement Insurance 83-9-1

11. Automobile Insurance 83-11-1

13. Fire Insurance 83-13-1

14. Homeowners' and Farmowners' Insurance [Repealed] 83-14-1

15. Title Insurance 83-15-1

17. Insurance Agents, Solicitors, or Adjusters 83-17-1

18. Insurance Administrators and Managing General Agents 83-18-1

19. Domestic Companies 83-19-1

20. Domicile Change for Domestic and Foreign Insurers 83-20-1

21. Foreign Companies 83-21-1

23. Insolvent Insurance Companies; Insurance Guaranty Association 83-23-1

24. Insurers Rehabilitation and Liquidation Act 83-24-1

25. Co-operative Insurance 83-25-1

27. Surety Companies 83-27-1

29. Fraternal Societies 83-29-1

30. Larger Fraternal Benefit Societies 83-30-1

31. Mutual Companies 83-31-1

33. Reciprocal Insurance 83-33-1

34. Windstorm Underwriting Association 83-34-1

35. Underwriting Association [Repealed] 83-35-1

36. Joint Underwriting Association for Medical Malpractice Insurance 83-36-1

37. Burial Associations 83-37-1

38. Mississippi Residential Property Insurance Underwriting Association Law 83-38-1

TITLE 83. INSURANCE (Cont'd)

Beginning Section
39. Bail Bonds and Bondsmen 83-39-1
41. Hospital and Medical Service Associations and Contracts 83-41-1
43. Nonprofit Dental Service Corporations 83-43-1
45. Nonprofit, Community Service Blood Supply Plans 83-45-1
47. Nonprofit Medical Liability Insurance Corporations 83-47-1
48. Medical Malpractice Insurance Availability Act 83-48-1
49. Legal Expense Insurance 83-49-1
51. Dental Care Benefits 83-51-1
52. Guaranteed Asset Protection Waivers 83-52-1
53. Credit Life and Credit Disability Insurance 83-53-1
54. Mississippi Creditor-Placed Insurance Act 83-54-1
55. Risk Retention Act 83-55-1
57. Home Warranties [Repealed]. 83-57-1
58. New Home Warranty Act 83-58-1
59. Business Transacted With Producer Controlled Insurer Act 83-59-1
61. Voluntary Basic Health Insurance Coverage Law 83-61-1
62. Health Savings Accounts 83-62-1
63. Small Employer Health Benefit Plans 83-63-1
64. Health Discount Plans 83-64-1
65. Regulation of Vehicle Service Contracts 83-65-101
67. Utilization of Modern Systems for Holding and Transferring Securities Without Physical Delivery 83-67-1
69. Interstate Insurance Product Regulation Compact 83-69-1
71. Unfair Discrimination Against Subjects of Abuse in Health, Life, and Disability Income Insurance 83-71-1
73. Portable Electronics Insurance 83-73-1
75. Homeowners Insurance Discount for Hurricane or Windstorm Damage Mitigation 83-75-1
77. Health Care Sharing Ministries 83-77-1
79. Property Insurance Clarity Act 83-79-1
81. Mississippi Direct Primary Care Act 83-81-1
83. Limited Lines Travel Insurance Act 83-83-1
85. Own Risk and Solvency Assessment Act 83-85-1

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP

CHAPTER 1. Assignment for Benefit of Creditors 85-1-1

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP (Cont'd)

Beginning Section
3. Exempt Property 85-3-1
5. Joint and Several Debtors 85-5-1
7. Liens 85-7-1
8. Uniform Federal Lien Registration Act 85-8-1
9. Debt Adjusting or Credit Arranging [Repealed]. 85-9-1
11. Mississippi Uniform State Tax Lien Registration Act 85-11-1
13. Automated Data Match System for Identifying and Seizing Financial Assets of Obligors Identified by Department of Revenue 85-13-1

TITLE 87. CONTRACTS AND CONTRACTUAL RELATIONS

Chapter 1. Gambling and Future Contracts 87-1-1
3. Power and Letters of Attorney 87-3-1
5. Principal and Surety 87-5-1
7. Improvements to Real Property 87-7-1
9. General Provisions 87-9-1

TITLE 89. REAL AND PERSONAL PROPERTY

Chapter 1. Land and Conveyances 89-1-1
2. Liability of Recreational Landowners 89-2-1
3. Acknowledgments 89-3-1
5. Recording of Instruments 89-5-1
6. Mississippi Plane Coordinate System 89-6-1
7. Landlord and Tenant 89-7-1
8. Residential Landlord and Tenant Act 89-8-1
9. Condominiums 89-9-1
11. Escheats 89-11-1
12. Uniform Disposition of Unclaimed Property Act 89-12-1
13. Party Fences 89-13-1
15. Party Walls 89-15-1
17. Salvage 89-17-1
19. Mississippi Conservation Easements 89-19-1
21. Uniform Disclaimer of Property Interests Act .. 89-21-1
23. Mississippi Uniform Environmental Covenants Act 89-23-1
25. Mississippi Uniform Statutory Rule Against Perpetuities 89-25-1

TITLE 91. TRUSTS AND ESTATES

Chapter 1. Descent and Distribution 91-1-1

TITLE 91. TRUSTS AND ESTATES (Cont'd)

Beginning Section
3. Uniform Simultaneous Death Law 91-3-1
5. Wills and Testaments 91-5-1
7. Executors and Administrators 91-7-1
8. Mississippi Uniform Trust Code 91-8-101
9. Trusts and Trustees 91-9-1
11. Fiduciary Security Transfers 91-11-1
13. Fiduciary Investments 91-13-1
15. Release of Powers of Appointment 91-15-1
17. Mississippi Principal and Income Act of 2013 .. 91-17-101
19. Gifts to Minors [Repealed] 91-19-1
20. Transfers to Minors 91-20-1
21. Uniform Transfer-on-Death Security Registration Act 91-21-1
23. Revised Uniform Fiduciary Access to Digital Assets Act 91-23-1

TITLE 93. DOMESTIC RELATIONS

CHAPTER 1. Marriage 93-1-1
3. Husband and Wife 93-3-1
5. Divorce and Alimony 93-5-1
7. Annulment of Marriage 93-7-1
9. Parentage 93-9-1
11. Enforcement of Support of Dependents 93-11-1
12. Enforcement of Child Support Orders from Foreign Jurisdictions 93-12-1
13. Parental Guardianship 93-13-1
14. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act 93-14-101
15. Mississippi Termination of Parental Rights Law 93-15-1
16. Grandparents' Visitation Rights 93-16-1
17. Adoption, Change of Name, and Legitimation of Children 93-17-1
19. Removal of Disability of Minority 93-19-1
20. Guardianship and Conservatorship 93-20-101
21. Protection from Domestic Abuse 93-21-1
22. Uniform Interstate Enforcement of Domestic Violence Protection Orders 93-22-1
23. Uniform Child Custody Jurisdiction Act [Repealed] 93-23-1
25. Uniform Interstate Family Support Act 93-25-101
27. Uniform Child Custody Jurisdiction and Enforcement Act 93-27-101

TITLE 93. DOMESTIC RELATIONS (Cont'd)

Beginning Section

29. Uniform Child Abduction Prevention Act 93-29-1
31. Supporting and Strengthening Families Act 93-31-1

TITLE 95. TORTS

CHAPTER
1. Libel and Slander 95-1-1
3. Nuisances 95-3-1
5. Trespass 95-5-1
7. Liability Exemption for Donors of Food 95-7-1
9. Liability Exemption for Volunteers and Sports Officials 95-9-1
11. Liability Exemption for Equine and Livestock Activities 95-11-1
13. Liability Exemption for Noise Pollution by Sport-shooting Ranges 95-13-1
15. Liability Exemption for Report of Suspicious Activity or Behavior 95-15-1

TITLE 97. CRIMES

CHAPTER
1. Conspiracy, Accessories and Attempts 97-1-1
3. Crimes Against the Person 97-3-1
5. Offenses Affecting Children 97-5-1
7. Crimes Against Sovereignty or Administration of Government 97-7-1
9. Offenses Affecting Administration of Justice 97-9-1
11. Offenses Involving Public Officials 97-11-1
13. Election Crimes 97-13-1
15. Offenses Affecting Highways, Ferries and Waterways 97-15-1
17. Crimes Against Property 97-17-1
19. False Pretenses and Cheats 97-19-1
21. Forgery and Counterfeiting 97-21-1
23. Offenses Affecting Trade, Business and Professions 97-23-1
25. Offenses Affecting Railroads, Public Utilities and Carriers 97-25-1
27. Crimes Affecting Public Health 97-27-1
29. Crimes Against Public Morals and Decency 97-29-1
31. Intoxicating Beverage Offenses 97-31-1
32. Tobacco Offenses 97-32-1
33. Gambling and Lotteries 97-33-1
35. Crimes Against Public Peace and Safety 97-35-1
37. Weapons and Explosives 97-37-1

TITLE 97. CRIMES (Cont'd)

Beginning Section
39. Dueling 97-39-1
41. Cruelty to Animals 97-41-1
43. Racketeer Influenced and Corrupt Organization Act (RICO) 97-43-1
44. Mississippi Streetgang Act 97-44-1
45. Computer Crimes and Identity Theft 97-45-1

TITLE 99. CRIMINAL PROCEDURE

CHAPTER 1. General Provisions; Time Limitations; Costs 99-1-1
3. Arrests 99-3-1
5. Bail 99-5-1
7. Indictment 99-7-1
9. Process 99-9-1
11. Jurisdiction and Venue 99-11-1
13. Insanity Proceedings 99-13-1
15. Pretrial Proceedings 99-15-1
17. Trial 99-17-1
18. Office of State Public Defender 99-18-1
19. Judgment, Sentence, and Execution 99-19-1
20. Community Service Restitution 99-20-1
21. Fugitives From Other States 99-21-1
23. Peace Bonds 99-23-1
25. Forms 99-25-1
27. Proceedings for Intoxicating Beverage Offenses 99-27-1
29. Vagrancy Proceedings 99-29-1
31. Obscene Publications Proceedings [Repealed] 99-31-1
33. Prosecutions Before Justice Court Judges 99-33-1
35. Appeals 99-35-1
36. Victim Assistance Coordinator 99-36-1
37. Restitution to Victims of Crimes 99-37-1
38. Crime Victim's Escrow Account Act 99-38-1
39. Post-Conviction Proceedings 99-39-1
40. Indigent Appeals Division 99-40-1
41. Mississippi Crime Victims' Compensation Act 99-41-1
43. Mississippi Crime Victims' Bill of Rights 99-43-1
45. Statewide Automated Victim Information and Notification System 99-45-1
47. Victim of Domestic Violence, Sexual Assault or Stalking Address Confidentiality Program 99-47-1
49. Preservation and Accessibility of Biological Evidence 99-49-1

MISSISSIPPI CODE
1972
ANNOTATED

VOLUME THREE

TITLE 11.

CIVIL PRACTICE AND PROCEDURE

Chapter 1. Practice and Procedure Provisions Common to Courts. 11-1-1
Chapter 3. Practice and Procedure in Supreme Court. 11-3-1
Chapter 5. Practice and Procedure in Chancery Courts. 11-5-1
Chapter 7. Practice and Procedure in Circuit Courts. 11-7-1
Chapter 9. Practice and Procedure in County Courts and Justice Courts. 11-9-1
Chapter 11. Venue of Actions. 11-11-1
Chapter 13. Injunctions. 11-13-1
Chapter 15. Arbitration and Award. 11-15-1
Chapter 17. Suits to Confirm Title or Interest and to Remove Clouds on Title. 11-17-1
Chapter 19. Ejectment. 11-19-1
Chapter 21. Partition of Property. 11-21-1
Chapter 23. Trial of Right of Property. 11-23-1
Chapter 25. Unlawful Entry and Detainer. 11-25-1

CHAPTER 1.

PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS

Sec.
11-1-1. Before whom oaths may be taken.
11-1-3. Oath of an agent or attorney sufficient in all cases.
11-1-5. All papers relating to a cause filed together.
11-1-6 and 11-1-7. Repealed.
11-1-8. Advertising by attorneys not admitted to practice in Mississippi prohibited.
11-1-9. Continuance of action or proceeding where counsel is legislator.
11-1-11 through 11-1-15. Repealed.
11-1-16. Proceedings in vacation; jurisdiction and authority of judge.
11-1-17. Time for rendition of final decree; right of appeal where decree not entered within required time.
11-1-18. Bench trials allowed in certain cases where parties agree.
11-1-19. Repealed.
11-1-21. Excess remitted.
11-1-23. Court or judge may require new security.

Sec.
11-1-25. Certain bonds not affected by irregularity.
11-1-27. Bonds payable to the state in certain cases.
11-1-29. Proceedings on death of surety on bonds, etc.
11-1-31. Death of parties on bonds having force of judgment.
11-1-33. Death of parties on bonds having force of judgment; citation in anticipation of judgment.
11-1-35. Death of parties on bonds having force of judgment; when citation issued and returnable.
11-1-37. Certification of transferred causes.
11-1-39. Proceedings in transferred causes.
11-1-41. Costs in transferred causes.
11-1-43. Seizure of perishable commodities by legal process.
11-1-45. Seizure of perishable commodities by legal process; declaration or bill.
11-1-47. Seizure of perishable commodities by legal process; possessor presumed to be owner.
11-1-49. Seizure of perishable commodities by legal process; process as to nonresident owners.
11-1-51. Copy of books, papers, or documents furnished; issuance and service of subpoenas duces tecum.
11-1-52. Limitations on charges permitted for photocopying patients' records by medical provider; physicians to make reasonable charges for depositions; limitations on charges permitted for execution of patient-requested medical record affidavit by medical provider; medical providers to comply with HIPAA.
11-1-53. Harrison County; commencement of civil actions, change of venue and transfer of cases between districts.
11-1-54. Assessment for filing frivolous claims.
11-1-55. Authority to impose condition of additur or remittitur.
11-1-56. Responsive pleading to precede assignment to a judge.
11-1-57. Additional provisions applicable to all courts.
11-1-58. Certificate of consultation required in medical malpractice actions; exceptions.
11-1-59. Damages in medical malpractice actions.
11-1-60. Limitation on noneconomic damages in medical malpractice actions; definitions.
11-1-61. Expert witness in action against physician.
11-1-62. Protection of medical professionals who prescribe FDA approved drugs.
11-1-63. Product liability actions; conditions for liability; what constitutes a defective product.
11-1-64. Repealed.
11-1-65. Punitive damages; limitations.
11-1-66. Immunity of premise owners from civil liability in certain circumstances.
11-1-66.1. Landowners Protection Act; limitation of liability of landowners for certain injuries of invitees injured on landowner's property.
11-1-67. Authority to sue traders in firearms reserved to state.
11-1-69. Prohibition of hedonic damages in civil actions.
11-1-71. Immunity of medical personnel who provide volunteer service in school programs.

§ 11-1-1. Before whom oaths may be taken.

A judge of any court of record, clerk of such court, court reporter of such court, master, member of the board of supervisors, justice court judge, notary public, mayor, or police justice of a city, town or village, clerk of a municipality, and any officer of any other state, or of the United States, authorized by the law thereof to administer oaths, the judge of any court of record, or the mayor or chief magistrate of any city, borough or corporation of a foreign country; may administer oaths and take and certify affidavits whenever the same may be necessary or proper in a proceeding in any court or under any law of this state, or for the purpose of taking depositions of any party of interest, or witnesses of any suit pending before any such court, or for the perpetuation of testimony, as provided in Section 13-1-57, Mississippi Code of 1972.

HISTORY: Codes 1857, ch. 61, art. 222; 1871, § 686; 1880, § 2294; 1892, § 934; 1906, § 1010; Hemingway's 1917, § 730; 1930, § 745; 1942, § 1660; Laws, 1962, ch. 306; Laws, 1988, ch. 347, § 1; Laws, 1991, ch. 573, § 12, eff from and after July 1, 1991.

Editor's Notes — Section 13-1-57, referred to in this section, was repealed by Laws of 1975, ch. 501, § 22, effective from and after January 1, 1976. Comparable provisions now appear in Section 13-1-227.

Cross References — Appointment of official court reporter, see § 9-13-1.

Application to all courts of circuit court civil practice provisions, see § 11-7-1.

Venue of civil actions or suits generally, see §§ 11-11-1 et seq.

Rules of evidence generally, see §§ 13-1-1 et seq.

Process, notice and publication generally, see §§ 13-3-1 et seq.

Power of notaries public to administer oaths, see §§ 25-33-9, 25-33-11.

Acknowledgment and proof of conveyances or other contracts dealing with property, see §§ 89-3-3, 89-3-9.

Rules governing civil practice and procedure in Mississippi courts, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant's claim that the trial court was without jurisdiction to accept defendant's guilty plea was unsupported and without merit as defendant's affidavit and the unsworn statement of the victim purporting to have had consensual sex with defendant in another county, which was not presented to the trial court, was insufficient evidence to support defendant's allegation. Moore v. State, 250 So. 3d 521, 2018 Miss. App. LEXIS 317 (Miss. Ct. App. 2018), cert. denied, 265 So. 3d 180, 2019 Miss. LEXIS 99 (Miss. 2019).

Petitioner failed to furnish affidavits or show cause why he could not furnish affidavits to support his claims that he was shackled in front of the jury, as required by Miss. Code Ann. §§ 99-39-9(1)(e), 11-1-1; although the petitioner referred to statements as "affidavits," they had not been notarized before any official. Wilcher v. State, 863 So. 2d 719, 2003 Miss. LEXIS 526 (Miss. 2003), cert. denied, 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678 (U.S. 2004).

For a murder trial taking place in Tennessee, a court reporter was authorized to take the deposition of a witness in Mississippi. State v. Powers (Tenn. Jan. 6, 2002).

The manner of selection of guardians as provided by the statutes is not exclusive, and a selection made by a notary public was sufficient where the notary public was authorized to administer oaths. Vaughn v. Vaughn, 226 Miss. 153, 83 So. 2d 821, 1955 Miss. LEXIS 618 (Miss. 1955).

Proceeding for seizure of property on which seller had purchase-money lien held not invalid because affidavit for seizure was made before officer in another state, since statute, providing that person having purchase-money lien "can enforce same" by making affidavit before proper officer of county where subject-matter of lien may be, is not mandatory. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337, 1936 Miss. LEXIS 277 (Miss. 1936).

A justice of the peace is authorized to take affidavits in his own county, to be used elsewhere. Cassedy v. Mayers, 64 Miss. 356, 1 So. 510 (Miss. 1886).

Every affidavit taken in the progress of any suit must bear upon its face the title of the suit in which it is taken, and show the proceedings to which it is intended to reply. Saunders v. Erwin, 3 Miss. 732, 1838 Miss. LEXIS 34 (Miss. 1838).

Whenever an officer is confined in the execution of his duties to a particular territory, all of his official acts must show upon their face that they were performed within such territory. Saunders v. Erwin, 3 Miss. 732, 1838 Miss. LEXIS 34 (Miss. 1838).

OPINIONS OF THE ATTORNEY GENERAL

This section gives the mayor of a municipality the authority to administer oaths and therefore swear other public officials into office. Sanford, Aug. 13, 2004, A.G. Op. 04-0375.

RESEARCH REFERENCES

ALR.

Sufficiency of certificate of acknowledgment. 25 A.L.R.2d 1124.

Am. Jur.

3 Am. Jur. 2d, Affidavits §§ 6, 7.

20 Am. Jur. 2d (Rev), Courts §§ 34, 35.

58 Am. Jur. 2d, Oath and Affirmation §§ 16, 17, 20-22.

18A Am. Jur. Pl & Pr Forms (Rev), Oath and Affirmation, Forms 1-6.

13C Am. Jur. Legal Forms 2d, Oath and Affirmation, §§ 189:5-189:7, 189:9.

12 Am. Jur. Proof of Facts, Acknowledgments, Proof No. 1 (Valid acknowledgment–testimony of notary).

CJS.

2A C.J.S., Affidavits §§ 9, 53.

21 C.J.S., Courts §§ 116-118.

§ 11-1-3. Oath of an agent or attorney sufficient in all cases.

In all cases where the oath or affirmation of the party is required, such oath or affirmation may be made by his agent or attorney, and shall be as effectual for all purposes as if made by the party.

HISTORY: Codes 1857, ch. 61, art. 223; 1871, § 687; 1880, § 2295; 1892, § 935; 1906, § 1011; Hemingway's 1917, § 731; 1930, § 746; 1942, § 1661.

Cross References — Execution of process on attorney in fact, see § 87-3-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Agent or attorney.

1. In general.

Where a statute specifically prescribes who shall make a certain affidavit, it can be made by none other than the persons specified, although there is nothing in the language of the statute to show that its designation was intended to be exclusive. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

This section is inapplicable with respect to an affidavit of complainant accompany-ing a bill for divorce under Code 1942, § 2737, since under the latter section the designation of complainant as the person to make the affidavit is exclusive. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

In all cases the affidavit should be special and show whether the knowledge or information be that of the party or the attorney. Burks v. Burks, 66 Miss. 494, 6 So. 244, 1889 Miss. LEXIS 135 (Miss. 1889).

2. Agent or attorney.

Where motion which was signed and sworn to by appellant's attorney to reinstate a cause after dismissal of appeal because of the failure of appellant to file assignment of error and brief though he had 30 days, the motion was insufficient where it did not disclose that this failure was without the appellant's fault. Paine v. Wilemon, 218 Miss. 238, 67 So. 2d 289, 1953 Miss. LEXIS 535 (Miss. 1953).

It is not necessary that the prisoner himself swear to the application for change of venue where it appears from the affidavit of counsel filed before trial that the prisoner seems to be either insane or so shocked and mentally unbalanced since his arrest as to be unable to make a coherent statement and aid counsel in preparation of his defense. McGee v. State, 200 Miss. 350, 26 So. 2d 680, 1946 Miss. LEXIS 298 (Miss. 1946).

Affidavit to complaint made by attorney and reciting that allegations of complaint were correct and true held not objectionable for failure to disclose that facts were within personal knowledge of affiant, since, in absence of statement that allegations of facts were made on information, it was presumed to be sworn to on personal knowledge of affiant. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Answer denying charge of bill sworn to by attorney puts complainant to proof. Greene v. Greene, 145 Miss. 87, 110 So. 218, 1926 Miss. LEXIS 2 (Miss. 1926).

Where bill charged debt of gross amount not itemized, and answer sworn to by defendant's attorney denied debt, and itemized sworn account was not embraced in pleadings, ex parte sworn account was not admissible; ex parte sworn account, after pleadings in which such account was not embraced or at issue, did not impose on defendant duty to file counteraffidavit specifying particular items denied. Greene v. Greene, 145 Miss. 87, 110 So. 218, 1926 Miss. LEXIS 2 (Miss. 1926).

Treasurer of corporation may make oath to open account within statute. W. M. Finck & Co. v. Brewer, 133 Miss. 9, 96 So. 402, 1923 Miss. LEXIS 103 (Miss. 1923).

Affidavit of agent to dispossess must be personal, and state facts. Downing v. Campbell, 131 Miss. 137, 95 So. 312, 1922 Miss. LEXIS 281 (Miss. 1922).

Attorney can make affidavit of defense on motion to set aside default judgment. Southwestern Surety Ins. Co. v. Treadway, 113 Miss. 189, 74 So. 143, 1916 Miss. LEXIS 41 (Miss. 1916).

The attorney can make affidavit for a principal to a plea of non est factum. Northrop v. Flaig, 57 Miss. 754, 1880 Miss. LEXIS 51 (Miss. 1880).

A bill in chancery, sworn to by the attorney of complainant, will not dispense with the rule requiring two witnesses, or one witness and corroborating circumstances, to overthrow the answer sworn to, as would be done if complainant himself swore to the bill. Jacks v. Bridewell, 51 Miss. 881, 1876 Miss. LEXIS 157 (Miss. 1876); Waller v. Shannon, 53 Miss. 500, 1876 Miss. LEXIS 102 (Miss. 1876).

Where a bill in chancery is sworn to by the attorney, the affidavit must be special, stating whether the allegations made on information and belief are on the information and belief of the complainant or of the attorney; and statements within the knowledge of the affiant must be stated to be within his knowledge. Waller v. Shannon, 53 Miss. 500, 1876 Miss. LEXIS 102 (Miss. 1876).

RESEARCH REFERENCES

Am. Jur.
61A Am. Jur. 2d, Pleading §§ 257, 261.

CJS.
71 C.J.S., Pleading §§ 516, 517, 544, 546.

§ 11-1-5. All papers relating to a cause filed together.

All the pleadings, writs, proofs, and other papers relating to any cause in court, shall be filed together by the clerk, and carefully preserved in his office.

HISTORY: Codes, 1857, ch. 61, art. 25; 1871, § 563; 1880, § 2283; 1892, § 932; 1906, § 1008; Hemingway's 1917, § 728; 1930, § 751; 1942, § 1666.

Cross References — Duty of chancery clerk to make final record, see § 9-5-161.
Larceny of court records, see § 97-9-3.

RESEARCH REFERENCES

Am. Jur.
15A Am. Jur. 2d (Rev), Clerks of Court § 50.

CJS.
21 C.J.S., Courts §§ 327-351.

§§ 11-1-6 and 11-1-7. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-1-6. [Codes, 1942, § 1659.5; Laws, 1972, ch. 341, § 1]

§ 11-1-7. [Codes, Hutchinson's 1848, ch. 54, art. 2 (6); 1857, ch. 62, art. 10; 1871, § 984; 1880, § 2265; 1892, § 914; 1906, § 990; Hemingway's 1917, § 710; 1930, § 734; 1942, § 1649]

Editor's Notes — Former § 11-1-6 provided for pretrial conferences.

Former § 11-1-7 provided that all matters pending when a court fails to hold a term or fails to continue to sit for entire term are continued, that there would be no discontinuance when a court failed to sit on any day in a term, and that a court could take a recess.

§ 11-1-8. Advertising by attorneys not admitted to practice in Mississippi prohibited.

The Legislature recognizes that attorneys should be licensed by the State of Mississippi before engaging in any solicitation of clients in this state. Such licensing of attorneys protects the people of Mississippi in that The Mississippi Bar has direct jurisdiction over attorneys licensed by it. The Mississippi Supreme Court can act against such licensed attorneys in the event that such licensed attorneys commit violations of Mississippi law, court rules and rules of ethics for attorneys. The Legislature finds that this section is necessary for the protection of the people of Mississippi. An attorney who is not admitted to The Mississippi Bar shall not advertise his legal services in this state for the purpose of soliciting prospective clients for commencement of any civil action in this state, or for the purpose of soliciting clients for any civil action already commenced or pending in this state, unless the attorney who is not a member of The Mississippi Bar has associated an attorney who (a) is a member of The Mississippi Bar; and (b) will be associated and actively working on substantial aspects in any civil action filed on behalf of a client solicited as a result of the advertisement. A law firm composed of both attorneys who are members of The Mississippi Bar and attorneys who are not members of The Mississippi Bar may advertise in this state if a majority of the members of the firm are members of The Mississippi Bar. For purposes of this section, a listing in the residential or business section of the white pages of a telephone book shall not be an advertisement.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 4, § 12, effective from and after January 1, 2003.

RESEARCH REFERENCES

Law Reviews.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

§ 11-1-9. Continuance of action or proceeding where counsel is legislator.

In any cause now pending or which shall hereafter be pending before any court of this state or before any administrative board, agency or commission of this state or before any court or administrative agency or any county or municipality of this state in which an application for continuance is properly made, predicated upon the ground that the counsel for the party making said application is a member of the Mississippi legislature and if said application is made at a time when the legislature is in session, either regular or extraordinary, or if said legislature will be in session at the time that said cause would be triable, then the continuance shall be granted in all cases.

HISTORY: Codes, 1942, § 1649.5; Laws, 1960, ch. 247; Laws, 1972, ch. 302, § 1, eff from and after passage (approved February 25, 1972).

Cross References — Continuance of Supreme Court cases, see § 11-3-7.
Continuance of trial in habeas corpus proceedings, see § 11-43-33.
Continuance of action against nonresident, see § 75-75-13.
Continuance in divorce cases, see § 93-5-7.
Application for continuance in capital cases, see § 99-15-31.

JUDICIAL DECISIONS

1. In general.

The length of time for which a continuance may be granted rests within the sound discretion of the trial court. Thus, in a prosecution for armed robbery in which defense counsel was a member of the Mississippi Legislature, the trial court did not err in granting defendant a continuance until the day following the adjournment of the legislature, despite his request for a continuance to the next term of court. Gooch v. State, 384 So. 2d 74, 1980 Miss. LEXIS 2022 (Miss. 1980), cert. denied, 450 U.S. 923, 101 S. Ct. 1374, 67 L. Ed. 2d 352, 1981 U.S. LEXIS 901 (U.S. 1981).

RESEARCH REFERENCES

Am. Jur.

17 Am. Jur. 2d, Continuance §§ 49, 50, 53.

7 Am. Jur. Pl & Pr Forms (Rev), Continuance, Forms 66, 69, 171 et seq.

CJS.

17 C.J.S., Continuances § 50.

§§ 11-1-11 through 11-1-15. Repealed.

Repealed by Laws, 1989, ch. 587, § 7, eff from and after April 25, 1989 (became law without the Governor's signature).

§ 11-1-11. [Codes, Hutchinson's 1848, ch. 53, art. 2 (186), ch. 54, art 2 (7); 1857, ch. 61, arts. 12, 13, ch. 62, art. 7; 1871, §§ 536, 986; 1880, § 2271; 1892, § 920; 1906, § 996; Hemingway's 1917, § 716; 1930, § 737; 1942, § 1652; Laws, 1952, ch. 239; Laws, 1988, ch. 429, § 1]

§ 11-1-13. [Codes, 1892, § 921; 1906, § 997; Hemingway's 1917, § 717; 1930, § 738; 1942, § 1653; Laws, 1928, Ex. ch. 86; Laws, 1952, ch. 235; Laws, 1966, ch. 352, § 2; Laws, 1988, ch. 429, § 3]

§ 11-1-15. [Codes, 1880, § 2272; 1892, § 922; 1906, § 998; Hemingway's 1917, § 718; 1930, § 739; 1942, § 1654]

Editor's Notes — Former § 11-1-11 prescribed the manner of finding a substitute when a circuit judge, county judge, or chancellor was disqualified from hearing a case.

Former § 11-1-13 provided distinctions between a special judge appointed for a particular case and one appointed for an entire term.

Former § 11-1-15 provided for judges of other districts to cover for judges who were disqualified in matters of vacation.

§ 11-1-16. Proceedings in vacation; jurisdiction and authority of judge.

(1) Notwithstanding the provisions of any other law to the contrary, the judge of any circuit, chancery, county, youth or family court or any other court of record shall, in vacation, and in the same manner as at a regular term, have jurisdiction to hear and determine and make and enter judgments, orders and decrees in all cases, civil or criminal, which are pending in the court and which were triable at the preceding term. Parties and witnesses duly summoned, subpoenaed or bound by recognizance at the preceding term shall be bound to attend without the necessity of additional process. Petit juries may be impaneled in such cases in the same manner as in termtime. All judgments, orders and decrees which the judge may render or make in such cases tried shall be signed by him and thereupon be entered and recorded on the minute book of the court in which the case or matter is pending, and shall have the same force and effect as if made, entered and recorded in termtime. Appeals

may be had and taken therefrom when so entered and recorded, as in other cases, in like manner as is provided by law when cases are tried in termtime.

(2) The provisions of this section shall be supplemental and in addition to all other jurisdiction and authority which the judge of any such court may lawfully exercise in vacation or at a special term.

HISTORY: Laws, 1983, ch. 388, eff from and after passage (approved March 23, 1983).

Editor's Notes — Laws, 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.

1. In general.

Trial court did not err in relying on the clerk's documentation as to when defendant's motion to reconsider sentence was truly filed; a judge may not alter or vacate a sentence once the term of court the defendant was sentenced in has ended, thus defendant was four days late, for jurisdictional purposes, in filing his motion; this motion could not be considered "pending" under Miss. Code Ann. § 11-1-16, because the motion was not filed before the term of court ended. Ducote v. State, 970 So. 2d 1309, 2007 Miss. App. LEXIS 831 (Miss. Ct. App. 2007).

Miss. Code Ann. § 11-1-16 (1991) clearly gives a circuit court authority to consider a pending motion after a term has ended; Dickerson v. State, 731 So. 2d 1082 (Miss. 1998) is overruled to the extent it is inconsistent with Miss. Code Ann. § 11-1-16 (1991). Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

The statute gives a circuit court authority to consider a pending motion after a term has ended. Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

There has been a vast expansion by statutory enactment of the times within which circuit judges are lawfully empowered to conduct court affairs. Although the Mississippi Constitution contemplates circuit courts being held at fixed, stated terms provided by statute, and the circuit courts of this State have had fixed terms, the legislature by various enactments – §§ 11-1-7 [Repealed], 11-7-131, 11-7-133 [Repealed], 11-7-121 [Repealed], 11-1-16, and 9-7-3 – has granted circuit courts wide latitude in taking official actions in vacation. Griffin v. State, 565 So. 2d 545, 1990 Miss. LEXIS 285 (Miss. 1990), limited, Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

Miss. Code Ann. § 11-1-16 (1991) clearly gives a circuit court authority to consider a pending motion after a term has ended; Dickerson v. State, 731 So. 2d 1082 (Miss. 1998) is overruled to the extent it is inconsistent with Miss. Code Ann. § 11-1-16 (1991). Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

The dispositive portion of a circuit judge's order entered in vacation setting aside defendants' convictions under 2 counts of an indictment had the same finality as a final judgment, and where no further action was taken in the ensuing regular term of the court, the circuit court was without authority thereafter to reinstate the convictions. Griffin v. State, 565 So. 2d 545, 1990 Miss. LEXIS 285 (Miss. 1990), limited, Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

Medical malpractice action was not required to be remanded for new trial because the prevailing parties in the court below failed to file their final judgment before the term of court closed, but in fact filed it at the next term of court. Latham v. Hayes, 495 So. 2d 453, 1986 Miss. LEXIS 2653 (Miss. 1986).

2. Applicability.

Trial court did not abuse its discretion in denying defendant's motion to reconsider a 10-year prison sentence for the sale of crack cocaine where the term of court in which defendant was sentenced had ended. Defendant did not qualify under the exception in Miss. Code Ann. § 11-1-16(1), as defendant's motion was not pending when the court term ended. McGee v. State, 976 So. 2d 954, 2008 Miss. App. LEXIS 141 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR.

Family court jurisdiction to hear contract claims. 46 A.L.R.5th 735.

§ 11-1-17. Time for rendition of final decree; right of appeal where decree not entered within required time.

All chancellors or judges of the chancery and circuit courts of the state of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as a date for the final brief or memoranda of authority is required to be filed on or as to the cause taken under advisement, whichever is the latest date after the date on which the cause or case is taken under advisement.

In the event a final decree has not been entered within the six months period hereinbefore referred to, then any party to said law suit shall have the right to appeal on the record as otherwise provided the same as if a final decree has been rendered adversely. Said appeal shall be to the supreme court of the state of Mississippi and shall be treated as a preferred case over other cases except election contests.

HISTORY: Codes, 1942, § 1650.5; Laws, 1958, ch. 334, § 3; Laws, 1962, ch. 388, § 2; Laws, 1966, ch. 445, § 4; Laws, 1968, ch. 334, § 1, eff from and after passage (approved August 7, 1968).

Editor's Notes — This section is modified or supplanted by Rule 15, Mississippi Rules of Appellate Procedure, as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

Cross References — Appeal from final judgment or decree, see § 11-51-3.

Writ of mandamus to require trial court decision, see Miss. R. App. P. 15.

JUDICIAL DECISIONS

1. In general.

Circuit court did not err in affirming the decision of a county board of supervisors to rezone certain property from agricultural and very low density residential to general industry because substantial evidence was before the board to support its decision, which was fairly debatable and could not be disturbed on appeal, and the impact of a hurricane on the area was an underlying concern and a significant factor in the change that had occurred in the area sought to be rezoned; the board was well aware of the impact of the hurricane on the county, and it implemented proper procedures for determining the rezoning of the area. Edwards v. Harrison County Bd. of Supervisors, 22 So. 3d 268, 2009 Miss. LEXIS 410 (Miss. 2009).

A chancery court ruling entitled "Court Opinion," which stated that it was the "final order," acted to finally terminate litigation in the trial court for purposes of appeal such that no further act by the court was necessary even though no separate "final judgment" was entered. Adoption of Karenina v. Presley, 526 So. 2d 518, 1988 Miss. LEXIS 244 (Miss. 1988).

Where the filings required for an appeal were made prior to a decision which abrogated § 11-1-17, which allowed an appeal to be taken directly to the Mississippi Supreme Court upon a trial court's failure to enter a final decree within six months after taking the matter under advisement or deferment, and which promulgated a rule replacing the appeal procedure with the right to apply to the Supreme Court for a writ of mandamus to compel a trial judge to render a decision on a matter taken under advisement or deferred, the appeal would be heard and decided in accordance with the prior existing law, and thus, the chancellor lost jurisdiction to render a decree once the appeal was perfected pursuant to § 11-1-17. Protective Service Life Ins. Co. v. Carter, 445 So. 2d 215, 1983 Miss. LEXIS 3016 (Miss. 1983).

An appeal would not lie under § 11-1-17, where the circuit court judge had neither taken the case under advisement nor set a final due date for the filing of briefs. Mabry v. Day-Brite Lighting Div., Emerson Electric Co., 416 So. 2d 677, 1982 Miss. LEXIS 2052 (Miss. 1982).

In an action for wrongful death where the jury returned a verdict for the defendant and where the circuit court failed to rule on the plaintiff's subsequent motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, the appeal would be dismissed since, if an order had been entered on the motion, it would have been an interlocutory order and therefore nonappealable from the circuit court to the Supreme Court. Woods v. Lee, 390 So. 2d 1010, 1980 Miss. LEXIS 2164 (Miss. 1980).

Party appealing to the Supreme Court under this section has the status of an appellant. Beall v. Beall, 310 So. 2d 706, 1975 Miss. LEXIS 1910 (Miss. 1975).

Where, upon remand from the supreme court, the trial court took the case under advisement following a hearing, but failed to decide the case within six months, appellant was entitled to appeal under the statute. Horton v. Horton, 301 So. 2d 305, 1974 Miss. LEXIS 1660 (Miss. 1974).

After an appeal was taken on the ground of the court's failure to render a final decree within 6 months after the date when the matter was taken under advisement, the lower court was without jurisdiction to enter any opinion or decree in the matter. Evans v. State, 258 So. 2d 419, 1972 Miss. LEXIS 1497 (Miss. 1972).

RESEARCH REFERENCES

ALR.

Consequences of prosecution's failure to file timely brief in appeal by accused. 27 A.L.R.4th 213.

Am. Jur.

47 Am. Jur. 2d, Judgments § 41.

CJS.

49 C.J.S., Judgments §§ 226, 227, 236, 238.

Law Reviews.

1982 Mississippi Supreme Court Review: Civil Procedure: Judicial Decisions. 53 Miss LJ 130, March 1983.

§ 11-1-18. Bench trials allowed in certain cases where parties agree.

If the parties to a cause of action agree, any claim filed alleging damages may receive a bench trial which shall be conducted in two hundred seventy (270) days or less after the cause of action has been filed. The cause of action shall be a priority item in the court.

HISTORY: Laws, 2004, 1st Ex. Sess., ch. 1, § 18, eff from and after September 1, 2004.

§ 11-1-19. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 61, art 1 (96); 1857, ch. 61, art 186; 1871, § 627; 1880, § 2298; 1892, § 940; 1906, § 1016; Hemingway's 1917, § 736; 1930, § 755; 1942, § 1670]

Editor's Notes — Former § 11-1-19 provided procedures for correcting errors in records of judgments and decrees and trial records.

§ 11-1-21. Excess remitted.

Where any bond, taken by virtue of any process or order, by miscalculation or mistake, shall be conditioned for the payment of a larger sum of money than by law ought to have been acquired thereby, and a verdict shall have been rendered thereon for the larger sum, or where a verdict shall be rendered for more damages than the plaintiff shall have demanded by his suit, and judgment be rendered accordingly, it shall be lawful for the plaintiff, at the same or any future term of the court, to release in open court any such excess; or he may in vacation release the same, in writing under his hand, and file it among the papers of the cause; and such release shall cure any error growing out of the excess. If the record of any such judgment be removed to an appellate court before the release be made, it shall be competent for the appellee to make such release in the appellate court; and thereupon, the court, after reversing the judgment, shall proceed to give such judgment as the court below ought to have given if the release had been filed therein; but in such case the appellant shall recover the costs paid, and the judgment shall not be entered against the sureties in the appeal bond.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (97, 98); 1857, ch. 61, arts. 187, 188; 1871, §§ 628, 629; 1880, §§ 2299, 2300; 1892, § 941; 1906, § 1017; Hemingway's 1917, § 737; 1930, § 756; 1942, § 1671; Laws, 1978, ch. 335, § 1, eff from and after July 1, 1978.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

RESEARCH REFERENCES

Am. Jur.
12 Am. Jur. 2d, Bonds § 27.

Law Reviews.
1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-1-23. Court or judge may require new security.

Each court, and the judge thereof in vacation, and any of the judges, if more than one compose the court, in all cases not especially provided for by statute, may require any bond, recognizance, obligation, or undertaking of any kind in any legal proceeding, of which the court has cognizance, which is shown to be insufficient, to be substituted by a new one, with sufficient sureties; and for a failure to comply with the order of the court or judge in the matter, the court or judge may make such order as may be proper in the case, and may direct such process as may be necessary or proper to enforce it; but notwithstanding the discharge of a supersedeas, injunction, attachment, or other process in consequence of such failure, a judgment or decree may be given on the bond or other obligation, or liability on it may be enforced by action or otherwise, as if it had not been held to be insufficient; but if done in vacation, five days' notice of the time and place of making application for the order shall be given to the opposite party; and in all cases reasonable time shall be allowed for giving new bond, upon such terms as the court or judge may prescribe.

HISTORY: Codes, 1880, § 2307; 1892, § 948; 1906, § 1024; Hemingway's 1917, § 744; 1930, § 757; 1942, § 1672.

Cross References — Authority of chancery court to reduce or cancel excessive bonds of receivers, executors, etc., see § 9-5-103.

Authority of Supreme Court to require new bond, see § 11-3-33.

Authority of circuit court to require new appeal bond, see § 11-51-97.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
That circuit court permitted alleged defective bond given on appeal from county court to be amended held not error. Bassett v. Building & Loan Ass'n, 164 Miss. 674, 145 So. 109, 1933 Miss. LEXIS 229 (Miss. 1933).

§ 11-1-25. Certain bonds not affected by irregularity.

When a bond, recognizance, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for the performance of any public contract, or for the faithful discharge of any duty, it shall inure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned; and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertaking payable and conditioned as prescribed by law, would have had; and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given.

HISTORY: Codes, 1880, § 2305; 1892, § 946; 1906, § 1022; Hemingway's 1917, § 742; 1930, § 758; 1942, § 1673.

Cross References — Validity of bonds without seal, see § 75-19-7.
Irregularities in bail bonds, see § 99-5-23.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Irregularity or insufficiency.
3. —Form of bond.
4. —As to payee or beneficiary.
5. —As to amount.
6. —As to conditions of bond.
7. Estoppel.

1. In general.

This section does not apply to bonds required in federal court under federal statutes. National Surety Co. v. Lee, 125 Miss. 517, 88 So. 7, 1921 Miss. LEXIS 137 (Miss. 1921).

This section has no application to a voluntary bond, and a cost bond is a voluntary bond if given in a suit after the court has adjudged its execution unnecessary. Nichols v. Gulf & S. I. R. Co., 83 Miss. 126, 36 So. 192, 1903 Miss. LEXIS 20 (Miss. 1903).

The statute does not apply where a defendant in execution gave a bond to have the proceeds of property levied on forthcoming. Such a bond is unauthorized; and in such case it makes no difference that another made a claimant's issue, the court will treat the officer as having the money in his hands. Carothers v. Leigh Bros., 60 Miss. 258, 1882 Miss. LEXIS 44 (Miss. 1882).

2. Irregularity or insufficiency.

This section cures all defects in bond after decree approving same. Little v. Cammack, 109 Miss. 753, 69 So. 594, 1915 Miss. LEXIS 222 (Miss. 1915).

Sureties on supersedeas bond, given on premature appeal, are liable for rent, where on appeal decree awarding plaintiff possession of land is affirmed, plaintiff in the meantime being deprived of possession. Perkins v. Watson, 92 Miss. 452, 46 So. 80, 1908 Miss. LEXIS 213 (Miss. 1908).

3. —Form of bond.

The obligors in a bond given in a replevin suit cannot, under the statute, object to judgment against them because the form of the bond be the one appropriate for a claimant's issue. Clark v. Clinton, 61 Miss. 337, 1883 Miss. LEXIS 133 (Miss. 1883).

4. —As to payee or beneficiary.

Action on a bond made in favor of the state for the use of a city was properly brought in the name of the state. Williams v. General Insurors, Inc., 6 So. 2d 922 (Miss. 1942).

Under this section the fidelity bond of a former liquidating agent of an insolvent bank was for the benefit of the depositors, creditors and stockholders of such bank and covered the misappropriation of funds thereof, notwithstanding that the bond was payable to the state banking department and it did not expressly provide for the security of the stockholders and creditors of the bank, and that it was not required by the banking laws, since it was given in the progress of a legal proceeding, the administration of the affairs of the bank by the chancery court, that the superintendent of banks had incidental powers to require such a bond and that the bank's supervision and control laws were enacted for the benefit of the depositors, creditors and stockholders of banks. Moore v. Bank of Indianola Liquidating Corp., 183 Miss. 626, 184 So. 305, 1938 Miss. LEXIS 274 (Miss. 1938).

That official bond of member of board of supervisors was payable to county, instead of to State, as required by statute, did not exempt surety from liability thereon, since bond inured to benefit of persons whom law designated it to secure, regardless of named obligee of bond. State use of Russell v. McRae, 169 Miss. 169, 152 So. 826, 1934 Miss. LEXIS 26 (Miss. 1934).

Bonds executed by surety for principal on contract for installing heating and ventilating system in high school protected materialmen. Union Indem. Co. v. Acme Blow Pipe & Sheet Metal Works, 150 Miss. 332, 117 So. 251, 1928 Miss. LEXIS 171 (Miss. 1928).

Failure of bond in certiorari to review proceedings of board of supervisors, to run to county, held not to require dismissal of certiorari. Ferguson v. Seward, 146 Miss. 613, 111 So. 596, 1927 Miss. LEXIS 208 (Miss. 1927).

Bond made payable to city does not prevent liability of surety to county under this section. United States Fidelity & Guaranty Co. v. Adams County, 105 Miss. 675, 63 So. 192, 1913 Miss. LEXIS 247 (Miss. 1913).

5. —As to amount.

When plaintiff's replevin bond does not recite amount, law writes into bond penalty of double value of property as ascertained by officer's return. Myers v. Daughdrill, 163 Miss. 298, 141 So. 583, 1932 Miss. LEXIS 42 (Miss. 1932), but see Hall v. Corbin, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

Chancery clerk taking injunction bond in proper amount is not subject to statutory penalty or damages if sureties are solvent. Davis v. Hale, 155 Miss. 309, 124 So. 370, 1929 Miss. LEXIS 297 (Miss. 1929).

Where all sureties but one had signed supersedeas bond, act of principal thereafter raising amount then procuring signature of additional surety relieved all sureties of liability regardless of this section. Parsons-May-Oberschmidt Co. v. Furr, 110 Miss. 795, 70 So. 895, 1916 Miss. LEXIS 201 (Miss. 1916).

Where supersedeas bond does not state an amount court is only authorized to render judgment for amount authorized by terms of the bond and rules of equity. Parsons-May-Oberschmidt Co. v. Furr, 110 Miss. 795, 70 So. 895, 1916 Miss. LEXIS 201 (Miss. 1916).

6. —As to conditions of bond.

Under this section a bond intended to be an indemnifying bond under § 1967, Code 1892, but conditioned by mistake under § 3482, Code 1892, will on a suit thereon be treated as though properly conditioned. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630, 1905 Miss. LEXIS 66 (Miss. 1905).

7. Estoppel.

Surety held estopped to rely on any defects in proceedings or to assert that defendant not signing bond did not authorize appeal where appeal bond executed by surety and one defendant recited that both defendants were appellants, record came before Supreme Court in regular form with appeal bond operating as supersedeas and court's attention was not directed to any defects therein. Great Atlantic & Pacific Tea Co. v. Majure, 176 Miss. 378, 168 So. 468 (Miss. 1936).

RESEARCH REFERENCES

Am. Jur.

12 Am. Jur. 2d, Bonds §§ 15 et seq.

CJS.

11 C.J.S., Bonds §§ 52 et seq.

§ 11-1-27. Bonds payable to the state in certain cases.

Any bond required to be given in any matter, where it is not prescribed to whom it shall be made payable, may be made payable to the state.

HISTORY: Codes, 1880, § 2306; 1892, § 947; 1906, § 1023; Hemingway's 1917, § 743; 1930, § 759; 1942, § 1674.

Cross References — Requirement that official bonds be made payable to state, see § 25-1-17.

Requirement that bail bonds and recognizances be made payable to state, see § 99-5-5.

OPINIONS OF THE ATTORNEY GENERAL

Bond which secures the patient funds held by the state must be payable to the state. Hendrix, Jan. 3, 2003, A.G. Op. #02-0753.

§ 11-1-29. Proceedings on death of surety on bonds, etc.

If any surety on a bond, recognizance, or undertaking of any kind given in any legal proceeding, shall be dead at the time for judgment to be rendered or execution to be issued thereon, that shall not prevent judgment from being rendered or execution being issued on such bond, recognizance, or undertaking against parties thereto who are living, but judgment may be rendered against such parties, and judgment nisi may be entered against the personal representatives of parties who are dead, and citation shall be issued to the personal representative to show cause why the judgment should not be made absolute against them, and it shall be made absolute unless, upon the return of citation executed, good cause be shown against it. Execution may be issued on such judgment against the living parties, and after the absolute judgment against the personal representatives, execution may be issued against them to enforce it.

HISTORY: Codes, 1880, § 2301; 1892, § 942; 1906, § 1018; Hemingway's 1917, § 738; 1930, § 761; 1942, § 1676.

Cross References — Proceedings on death of surety on bond in trial of right of property, see § 11-23-19.

Proceedings on death of surety on bond in ejectment, see § 11-51-37.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.

Death of principal as exoneration, defense, or ground for relief, of sureties on bail or appearance bond. 63 A.L.R.2d 830.

§ 11-1-31. Death of parties on bonds having force of judgment.

Where execution may be issued on any bond or undertaking, and some of the parties are dead, it may be issued separately against such as are alive, and citation may be issued to the personal representatives of such as are dead, to show cause against the issuance of execution against them on such bond or undertaking; and on the return of such citation executed, if no sufficient cause be shown against it, execution may be issued against them.

HISTORY: Codes, 1880, § 2302; 1892, § 943; 1906, § 1019; Hemingway's 1917, § 739; 1930, § 762; 1942, § 1677.

Cross References — Execution on death of surety on bond in trial of right of property, see § 11-23-19.

Execution on death of surety on bond in ejectment, see § 11-51-37.

Rule prescribing substitution for deceased parties, see Miss. R.Civ. P. 25.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.

Death of principal as exoneration, defense, or ground for relief, of sureties on bail or appearance bond. 63 A.L.R.2d 830.

§ 11-1-33. Death of parties on bonds having force of judgment; citation in anticipation of judgment.

Citation to the personal representatives of a deceased party may be issued and executed at any time before the time for judgment or execution on such bond, recognizance, or undertaking, requiring the appearance of the representatives before the court having possession or control of the obligation, to submit to judgment or execution thereon; and if issued and executed before the rendition of judgment or issuance of execution against the living parties, judgment may be rendered or execution issued against such personal representatives as well as against parties alive, without delay or further process.

HISTORY: Codes, 1880, § 2303; 1892, § 944; 1906, § 1020; Hemingway's 1917, § 740; 1930, § 763; 1942, § 1678.

Cross References — Rule prescribing substitution for deceased parties, see Miss. R.Civ. P. 25.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

§ 11-1-35. Death of parties on bonds having force of judgment; when citation issued and returnable.

Citations referred to in Section 11-1-33 may be issued in vacation or in term time without any order of court therefor, and may be made returnable on the return day for other process, if issued in vacation, or forthwith, if issued during the term of court, and shall be executed five days before judgment or execution against such personal representatives.

HISTORY: Codes, 1880, § 2304; 1892, § 945; 1906, § 1021; Hemingway's 1917, § 741; 1930, § 764; 1942, § 1679.

Cross References — Rule prescribing substitution for deceased parties, see Miss. R.Civ. P. 25.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

§ 11-1-37. Certification of transferred causes.

If a cause be transferred by order of the chancery court to the circuit court, or vice versa, the clerk of the court ordering the transfer shall forthwith deposit all the papers in the cause, together with his certificate of the fact of the transfer, in the court to which it was transferred, taking the receipt of the clerk therefor.

HISTORY: Codes, 1892, § 936; 1906, § 1012; Hemingway's 1917, § 732; 1930, § 765; 1942, § 1680.

Cross References — Constitutional authority for certification of transferred causes, see Miss. Const. Art. 6, § 163.

Jurisdiction of chancery court over causes transferred by circuit court, see § 9-5-81.

Jurisdiction of circuit court over cases transferred by chancery court, see § 9-7-83.

JUDICIAL DECISIONS

1. In general.

Where prior to the conclusion of the trial of a suit brought in the circuit court, the plaintiff made a motion to transfer the case to chancery court, and the circuit court granted such motion, the chancery court was vested with jurisdiction and the circuit court could not dispose of the case. Ainsworth v. Blakeney, 227 Miss. 544, 86 So. 2d 501, 1956 Miss. LEXIS 723 (Miss. 1956).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Courts § 82.

15 Am. Jur. Pl & Pr Forms (Rev), Judges, Forms 1, 81-84.

CJS.

21 C.J.S., Courts §§ 347, 350 et seq.

§ 11-1-39. Proceedings in transferred causes.

When the papers have been deposited in the court to which the cause was transferred, all the parties to the proceeding shall take notice of the fact of the transfer; and the complainant or plaintiff shall file his declaration or bill in the court to which the cause was transferred within thirty days, unless the court, judge, or chancellor shall restrict the time or grant further time; and the defendant shall plead within thirty days thereafter, unless the time, by like means, be restricted or extended. And the cause shall be proceeded with as if it had been originally begun in that court, as of the date on which the cause was originally instituted.

HISTORY: Codes, 1892, § 937; 1906, § 1013; Hemingway's 1917, § 733; 1930, § 766; 1942, § 1681.

JUDICIAL DECISIONS

1. In general.

Although plaintiff failed to refile his complaint with the chancery court of Forrest County after the case was transferred from the circuit court of Forrest County, Miss. Code Ann. § 11-1-39 did not require the dismissal of plaintiff's complaint. Gibson v. Williams, 186 So. 3d 836, 2016 Miss. LEXIS 108 (Miss. 2016).

Heavy equipment vendor's action against a county board of supervisors which was timely filed in the chancery court, but later transferred to the circuit court, would be deemed to have been timely filed in the circuit court. Canton Farm Equipment, Inc. v. Richardson, 501 So. 2d 1098, 1987 Miss. LEXIS 2273 (Miss. 1987).

When an action is transferred from the chancery court to the circuit court, or vice versa, in the transferee court the action is deemed filed as of the date of original filing in the transferor court. Canton Farm Equipment, Inc. v. Richardson, 501 So. 2d 1098, 1987 Miss. LEXIS 2273 (Miss. 1987).

Chancellor's denial of motion to dismiss case for failure to reform pleadings within 30 days following transfer of case from circuit to chancery court will not be reversed on appeal where no prejudice is shown to have resulted from denial. Star Chevrolet Co. v. Green, 473 So. 2d 157, 1985 Miss. LEXIS 2141 (Miss. 1985).

In an action by a construction company seeking to establish and enforce a claim for a construction lien against the property of the defendant, the trial court should have dismissed the cause where the plaintiff had failed to file its declaration within 30 days as required by the statute, notwithstanding the fact that the parties had continued discovery and communicated by letter with one another after the cause had been transferred from the chancery court to the circuit court; however, where the plaintiff did in fact file its declaration approximately 20 months after the cause had been transferred to the circuit court and where the defendant had answered the declaration joining issue and continued to participate in the trial of the cause until judgment, the judgment would be allowed to stand since the defendant had suffered no prejudice during the course of the trial and no good purpose would be served by requiring the parties and the court to undergo another extensive trial, incurring large sums of additional expense and consuming valuable judicial time. Central Grain & Supply Co. v. Jesco, Inc., 410 So. 2d 879, 1982 Miss. LEXIS 1876 (Miss. 1982).

The statute does not provide for a dismissal of the action where the plaintiff or complainant fails to file his declaration or bill of complaint in the transferee court. If a complainant or plaintiff fails to file his declaration or bill in the court to which the case has been transferred within 30 days or within such time as the transferee court shall fix, the case would be in the same posture as if no case had been filed and would be subject to dismissal without prejudice. Commercial Nat'l Bank v. Fleetwood Homes of Mississippi, Inc., 398 So. 2d 659, 1981 Miss. LEXIS 2020 (Miss. 1981).

In view of the provisions of Code 1942, § 360, actions brought in the chancery court to enforce laborer's and materialmen's liens were properly transferred by the chancellor to the Circuit Court, and an interlocutory appeal from the order of transfer should not have been granted. West v. Mechanical Services, Inc., 216 So. 2d 174, 1968 Miss. LEXIS 1223 (Miss. 1968).

Where prior to the conclusion of the trial of a suit brought in the circuit court, the plaintiff made a motion to transfer the case to chancery court, and the circuit court granted such motion, the chancery court was vested with jurisdiction and the circuit court could not dispose of the case. Ainsworth v. Blakeney, 227 Miss. 544, 86 So. 2d 501, 1956 Miss. LEXIS 723 (Miss. 1956).

Where an equitable proceeding by an insurance company seeks reimbursement on behalf of an insurance agency for an insurance agent's default in his accounts guaranteed by a bond, based on the theory of subrogation, was transferred to the circuit court, such court was under a duty to proceed with the suit the same "as if it had been originally begun in that court, as of the date on which the cause was originally instituted," even though it was exclusively one of equitable cognizance, and whether the transfer was proper or not. Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603, 1939 Miss. LEXIS 39 (Miss. 1939).

Defendant presenting plea before default judgment is entitled to trial on merits, where failure to timely present plea was through attorney's inadvertence. Tonkel v. Williams, 146 Miss. 842, 112 So. 368, 1927 Miss. LEXIS 246 (Miss. 1927).

On transfer of cause from circuit to chancery court upon issue of garnishee's liability raised by its answer setting up adjudication of the issue between garnishee and certain parties defendants to the bill in the chancery court, where plaintiff could only attack the judgment on the ground of fraud and collusion, it was error to dismiss the bill. Foote-Patrick Co. v. Caladonia Ins. Co., 113 Miss. 419, 74 So. 292, 1917 Miss. LEXIS 116 (Miss. 1917).

RESEARCH REFERENCES

Am. Jur.
20 Am. Jur. 2d (Rev), Courts § 82.

CJS.
21 C.J.S., Courts §§ 266, 272.

§ 11-1-41. Costs in transferred causes.

The complainant or plaintiff in the first court shall pay all the costs in such court; but he may recover the same of the defendant, in the court to which the cause was transferred, at the discretion of the court.

HISTORY: Codes, 1892, § 938; 1906, § 1014; Hemingway's 1917, § 734; 1930, § 767; 1942, § 1682.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

§ 11-1-43. Seizure of perishable commodities by legal process.

In order to promote the general welfare, to insure, prepare and expedite movement of commerce through the ports of the State of Mississippi, to avoid any unnecessary delay, to indemnify any damages to shippers through said ports, and to prevent any unnecessary delay, it is provided that any person, firm or corporation who shall hereafter seek in the courts of Mississippi, either the circuit courts or the chancery courts, to obtain writ of replevin, writ of sequestration, writ of seizure, writ of attachment, or other legal processes for the purpose of seizing any cargo or shipment of bananas or other perishable commodity passing through the ports of entry in the State of Mississippi, shall, before such writ is issued, post a good and sufficient bond with sufficient sureties thereon, to be approved by the clerk of the court, wherein such proceedings are instituted. Such bond shall be in a sum double the value of the commodities sought to be attached, replevied, sequestrated, seized or otherwise, payable to the person actually in possession of said commodities, and conditioned that the plaintiff therein shall indemnify and pay to the owner of such property such damages as he or it may sustain by reason of such seizure of said property, that he will pay all handling charges, charges that might accrue on demurrage on the ship, cars, warehouses, docks or railroad facilities and all freight charges, and that he will pay all attorney's fees, court cost and all other damages that might accrue by reason of such illegal seizure thereof.

HISTORY: Codes, 1942, § 1683; Laws, 1936, ch. 317.

Cross References — Sequestration generally, see §§ 11-29-1 et seq.
Attachments generally, see §§ 11-33-1 et seq.
Replevin generally, see §§ 11-37-101 et seq.
Sale of perishable goods, see § 13-3-167.
Warehouseman's options with regard to perishable goods, see § 75-7-206.
Remedy to enforce lien, see § 85-7-31.
Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.
6 Am. Jur. 2d, Attachment and Garnishment §§ 421, 423 et seq.

CJS.
7 C.J.S., Attachment §§ 149, 159.
38 C.J.S., Garnishment §§ 182, 183.

§ 11-1-45. Seizure of perishable commodities by legal process; declaration or bill.

When any affidavit is filed, either in circuit courts or chancery courts in the state of Mississippi, attaching, sequestrating, replevying, or seizing any commodities described in Section 11-1-43, the plaintiff therein shall be required to file, within forty-eight hours, after the writ or affidavit has been issued, a declaration stating cause of action if in the circuit courts, or a bill of complaint if filed in the chancery courts, stating cause of action upon which the seizure is made. Upon filing of said declaration or bill of complaint, an issue shall be joined thereon, and a hearing, in vacation, may be had before the circuit judge or chancellor in the said district where said writ was issued to determine the rights of the said parties to the ownership of the said commodities so seized. Upon hearing of evidence, the court may in vacation render judgment and award possession to the parties entitled and may, if said writ or writs were illegally issued out, award damages on said bond to the parties entitled thereto.

HISTORY: Codes, 1942, § 1684; Laws, 1936, ch. 317.

Cross References — Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

§ 11-1-47. Seizure of perishable commodities by legal process; possessor presumed to be owner.

The possessor of any perishable commodities as described in Section 11-1-43, shall be presumed to be the owner of said commodities and, in the event any writ of replevin, writ of seizure, writ of sequestration or writ of attachment shall be issued against such commodities, the possessor thereof shall have the immediate right to possession of said commodities upon his furnishing bond payable to the order of the clerk of the court in a sum equal to the value of the commodities.

HISTORY: Codes, 1942, § 1685; Laws, 1936, ch. 317.

Cross References — Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

§ 11-1-49. Seizure of perishable commodities by legal process; process as to nonresident owners.

If the owner of any such cargo or shipment of such perishable commodities be a nonresident of the State of Mississippi and be made a defendant in any action at law or suit in any chancery court, in any court of this state, service of summons or process of such court may be served on such defendant by serving a copy thereof on any steamship agent, ship captain, or other ship's officer, railroad agent, railroad conductor, stevedore or other person having possession or control of such cargo or shipment and by mailing a copy thereof by registered mail addressed to the last known address of such defendant, return receipt requested. When any summons or process against such nonresident owner of such cargo or shipment has been returned so executed, the defendant shall be considered in court and the action or suit shall proceed as though personal service had been had on such defendant, nonresident owner of such cargo or shipment, and all other process or notices necessary to be served in any court proceeding may be served as herein provided.

HISTORY: Codes, 1942, § 1686; Laws, 1936, ch. 317.

Cross References — Rule prescribing methods of service of summons, see Miss. R. Civ. P. 4.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

§ 11-1-51. Copy of books, papers, or documents furnished; issuance and service of subpoenas duces tecum.

(1) The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, in termtime or in vacation, order either party to make available to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or to grant permission to take a copy or photograph of any books, papers, documents, accounts, letters, photographs, objects, or tangible things, in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto; or order any party to permit entry upon designated land or other property in his possession or control, exclusive of said party's home or place of abode, for the purpose of inspecting, measuring, surveying or photographing the property or any designated relevant object or operation thereon; provided, however, the aforementioned entry upon desig-

nated land or other property may extend to a party's home or place of abode if such party be the plaintiff or complainant in a cause of action based on contractor's or materialmen's actions involving the construction, repair or improvement of such home or place of abode. If compliance with such order be refused, such books, papers, documents, accounts, letters, photographs, objects or tangible things shall not be given in evidence in the action or proceeding by the party so refusing; and the court may punish the recusant party as for a contempt of court. If a complainant or plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit or dismissal; and if a defendant fails to comply with such order, the court may, on motion, give judgment or decree against him by default or confession. Provided, however, this section shall neither be applicable to the work product of counsel for any party nor to matters of privilege or national security.

(2) The clerks of all county, circuit and chancery courts may issue subpoenas duces tecum without a prior order of the court and a copy of the subpoena shall be served personally or by mail on all attorneys of record in the cause or on any party not represented by an attorney. A subpoena duces tecum may command a person to whom it is directed to produce the books, papers, documents or tangible things designated therein, but on motion the court wherein the cause is pending, in termtime or vacation, promptly and in any event at or before the time specified in said subpoena for compliance therewith (a) may quash or modify said subpoena if it is unreasonable or oppressive, or (b) may condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. The provisions of this subsection shall be cumulative and additional to any other procedures provided by law.

(3) Chancellors and the judges of all county and circuit courts may order writs of subpoena duces tecum in vacation in the same manner as if allowed in open court. The provisions of this subsection shall be cumulative and additional to any other procedures provided by law.

HISTORY: Codes, 1857, ch. 61, art. 236; 1871, § 815; 1880, § 2277; 1892, § 927; 1906, § 1003; Hemingway's 1917, § 723; 1930, § 744; 1942, § 1659; Laws, 1900, ch. 97; Laws, 1956, ch. 234 1974, ch. 328, § 1; Laws, 1975, ch. 350, eff from and after passage (approved March 14, 1975).

Cross References — Withdrawal of exhibits from clerk of court, see § 9-13-29.

Power of arbitrators in certain arbitration proceedings to issue subpoenas to compel production of books, records, documents and other evidence, see § 11-15-117.

Award of attorney fees and costs against attorney or party who abuses discovery procedures available under the rules of civil procedure, see § 11-55-5.

Clerk refusing to give copy of papers, see § 97-11-17.

Rule covering the issuance and service of subpoena duces tecum, see Miss. R. Civ. P. 45.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Bills of discovery.
3. Inspection of records, etc.
4. Privileged matter.
5. Subpoena duces tecum.

1. In general.

This section is penal and the powers granted therein should be exercised with caution. Long v. Sledge, 209 So. 2d 814, 1968 Miss. LEXIS 1471 (Miss. 1968).

This section is not mandatory and a trial judge has some discretion in the matter as to whether he will require the production of the documents sought. Long v. Sledge, 209 So. 2d 814, 1968 Miss. LEXIS 1471 (Miss. 1968).

A proceeding may not be dismissed under this section for failure to produce records which would not be admissible in evidence. State ex rel. Patterson v. Bd. of Supervisors, 234 Miss. 26, 105 So. 2d 154, 1958 Miss. LEXIS 457 (Miss. 1958).

The statute is highly penal and requires an extraordinary state of case to justify the rendition of a judgment thereunder, and the power granted by it should be exercised with great caution to avoid the invasion of the rights of the parties. Equitable Life Assurance Soc. v. Clark, 80 Miss. 471, 31 So. 964, 1902 Miss. LEXIS 280 (Miss. 1902).

2. Bills of discovery.

Where a general demurrer has been sustained to a bill of complaint on the ground that it did not state a cause of action, the complainant had no right to require discovery or production of evidence. Burns v. Washington Savs., 251 Miss. 789, 171 So. 2d 322, 1965 Miss. LEXIS 903 (Miss. 1965).

Under this section one granted leave to file a bill of review for newly discovered evidence is entitled to a full discovery from the other party of all evidence bearing on the merits. Ford v. Commercial Sec. Co., 236 Miss. 130, 109 So. 2d 352, 1959 Miss. LEXIS 302 (Miss. 1959).

Fact that, under statute, party may demand and receive papers and documents from his adversary without necessity of bill of discovery, does not deprive chancery court of jurisdiction of pure bills of discovery. Callender v. Lamar Life Ins. Co., 182 Miss. 609, 182 So. 119, 1938 Miss. LEXIS 199 (Miss. 1938).

Decree rendered on bill of discovery which sought only discovery of life policy was not res judicata on issue of insurer's liability in subsequent suit on policy, which insurer allegedly wrongfully claimed was void. Callender v. Lamar Life Ins. Co., 182 Miss. 609, 182 So. 119, 1938 Miss. LEXIS 199 (Miss. 1938).

Discovery is not open to demurrer on ground that litigant had remedy under this section. Citizens' Bank of Hattiesburg v. Tracy, 120 Miss. 413, 82 So. 307, 1919 Miss. LEXIS 99 (Miss. 1919).

3. Inspection of records, etc.

In a proceeding before the Public Service Commission on proposed changes in the gas rate, it was error to deny the gas company's motion, made pursuant to this section, to examine the raw data upon which the commission witness based his expert opinion. Mississippi Public Service Com. v. Mississippi Valley Gas Co., 358 So. 2d 418, 1978 Miss. LEXIS 2551 (Miss. 1978).

The unsworn motion of the defendants to require the plaintiff to produce copies of his income tax returns does not constitute a showing of good cause for their production. Long v. Sledge, 209 So. 2d 814, 1968 Miss. LEXIS 1471 (Miss. 1968).

The refusal of the trial court, on the unsworn motion of the defendants, to require the plaintiff to produce copies of his income tax returns was not an abuse of discretion. Long v. Sledge, 209 So. 2d 814, 1968 Miss. LEXIS 1471 (Miss. 1968).

Overruling of a motion to require plaintiff to produce records and documents for inspection and copying is reversible error, where the information was necessary to the defense of a property damage action. Mississippi Power Co. v. Harrison, 247 Miss. 400, 152 So. 2d 892, 1963 Miss. LEXIS 313 (Miss. 1963).

Refusal of defendant's request for the production of a written statement of a state's witness to the district attorney, held no error. Mattox v. State, 243 Miss. 402, 139 So. 2d 653, 1962 Miss. LEXIS 357 (Miss. 1962).

A motion in a negligence action to require the other party to permit inspection, before trial, of photographs which he has caused to be taken should be specific as to the particular photographs desired and what they portray. Dent v. Luckett, 242 Miss. 559, 135 So. 2d 840, 1961 Miss. LEXIS 593 (Miss. 1961).

Although, in an action upon demand notes, the trial court committed error in permitting the defendants, who contended that the name of the payee had been changed and that it was necessary to obtain expert testimony on the question, to submit the notes to an expert, who resided without the court's jurisdiction, the error was not prejudicial where the plaintiffs did not object thereto, or object to the expert's testimony on the ground that it was obtained by court order in contravention of statute, and the notes were restored to plaintiffs in the same condition as they were in when delivered to the defendants. Boxwell v. Champagne, 229 Miss. 355, 91 So. 2d 256, 1956 Miss. LEXIS 615 (Miss. 1956).

Where, in prosecution for murder defendant made a motion to be permitted to confer with the state's witnesses while the jury was being selected and to see the confession which he had signed and a trial court permitted him to confer with the witnesses as soon as selection of the jury was completed and, when state offered confession in evidence, it was first tendered to attorney for defendant and the confession was not admitted until the court first made a preliminary inquiry into its admissibility, the defendant was in no manner prejudiced. Jones v. State, 222 Miss. 387, 76 So. 2d 201, 1954 Miss. LEXIS 655 (Miss. 1954).

Those alleging a resulting trust in real estate were entitled to an inspection and copy of the books and records kept by one since deceased which would reveal information pertinent to the issues. Shepherd v. Johnston, 201 Miss. 99, 28 So. 2d 661, 1947 Miss. LEXIS 374 (Miss. 1947).

In proceeding on motion against a former sheriff and his sureties to charge them with liability for failure to make return of a writ of execution on return day thereof, movant, under this section [Code 1942, § 1659], could have obtained an inspection and copy of the receipt in the hands of such sheriff if the writ had been delivered to his successor. W. T. Rawleigh Co. v. Hester, 190 Miss. 329, 200 So. 250, 1941 Miss. LEXIS 53 (Miss. 1941).

Defendant's motion for subpoena duces tecum to produce notes of evidence, taken by Federal officers investigating killing, for purpose of impeaching witnesses, held properly denied as not stating facts expected to be proved. Eaton v. State, 163 Miss. 130, 140 So. 729, 1932 Miss. LEXIS 23 (Miss. 1932).

Court could order plaintiff, foreign corporation, to permit inspection and taking of copies by defendant of plaintiff's books and papers. Security Finance Co. v. Tindall, 151 Miss. 516, 118 So. 606, 1928 Miss. LEXIS 357 (Miss. 1928).

On appeal from assessment of taxes, circuit court may require production and inspection of books and papers showing property's value; where evidence shows taxpayer has books and papers showing value of property, circuit court, on appeal from tax assessment, should order their production. Knox v. L. N. Dantzler Lumber Co., 148 Miss. 834, 114 So. 873, 1927 Miss. LEXIS 94 (Miss. 1927).

In an action for privilege tax an application for inspection of defendant's books should be granted. Robertson v. Greenwood Lumber Co., 127 Miss. 793, 90 So. 487, 1921 Miss. LEXIS 282 (Miss. 1921).

4. Privileged matter.

This section does not apply to documents and other material which are qualifiedly privileged, unless the movant's evidence shows that the person in possession of the qualifiedly privileged matter has probably exceeded the privilege by publishing it with malice and bad faith, and on a motion to produce, this is an issue for the trial court in its sound discretion. Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727, 1962 Miss. LEXIS 459 (Miss. 1962).

Before a movant is entitled to production of qualifiedly privileged mercantile credit reports or other qualifiedly privileged documents, he must present facts which make a prima facie showing that the information in question is material and relevant, that disclosure is necessary or essential to the proper development of the cause of action, that the information is not otherwise available, and that the person against whom the motion is directed has exceeded the qualified privilege by malice and bad faith. Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727, 1962 Miss. LEXIS 459 (Miss. 1962).

5. Subpoena duces tecum.

In a products liability case, a trial court abused its discretion by imposing sanctions arbitrarily since the record reflected that an injured party and his expert witness complied with a subpoena duces tecum actually served by a ladder company. The attendance of a nonparty expert witness had to be obtained by a proper subpoena; a subpoena ad testificandum requiring the presence of the expert witness was not served. Laws v. Louisville Ladder, Inc., 146 So. 3d 380, 2014 Miss. App. LEXIS 454 (Miss. Ct. App. 2014).

RESEARCH REFERENCES

ALR.

Necessity and sufficiency, under statutes and rules governing modern pretrial discovery practice, of "designation" of documents, etc., in application or motion. 8 A.L.R.2d 1134.

What constitutes books of original entry within rule as to admissibility of books of account. 17 A.L.R.2d 235.

Pretrial deposition – discovery of opinions of opponent's expert witnesses. 86 A.L.R.2d 138.

Discovery, in civil case, of material which is or may be designed for use in impeachment. 18 A.L.R.3d 922.

Assertion of privilege in pretrial discovery proceedings as waiver of privilege at trial. 36 A.L.R.3d 1367.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding. 8 A.L.R.4th 1181.

Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery. 19 A.L.R.4th 1236.

Right of prosecution to discovery of case – related notes, statements, and reports – state cases. 23 A.L.R.4th 799.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects. 26 A.L.R.4th 849.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 A.L.R.4th 9.

Rights and remedies of financial institution customer in relation to subpoena duces tecum exception to general prohibitions of state right to financial privacy statute. 43 A.L.R.4th 1157.

Discovery of defendant's sales, earnings, and profits on issue of punitive damages in tort action. 54 A.L.R.4th 998.

Discoverability of traffic accident reports and derivative information. 84 A.L.R.4th 15.

Criminal liability of attorney for tampering with evidence. 49 A.L.R.5th 619.

Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications. 88 A.L.R.6th 319.

Pretrial discovery of facts known and opinions held by opponent's experts under Rule 26(b)(4) of Federal Rules of Civil Procedure. 33 A.L.R. Fed. 403.

Restriction on dissemination of information obtained through pretrial discovery proceedings as violating Federal Constitution's First Amendment – federal cases. 81 A.L.R. Fed. 471.

Public access to records and proceedings of civil actions in Federal District Courts. 96 A.L.R. Fed. 769.

Am. Jur.

23 Am. Jur. 2d, Depositions and Discovery §§ 66 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Depositions and Discovery, Forms 481 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Depositions and Discovery, Form 503.1 (Notice of motion–For further order to inspect and copy document or paper).

18 Am. Jur. Pl & Pr Forms (Rev), Motions, Rules, and Orders, Form 28.1 (Mo-

tion–To compel–Production of requested materials).

41 Am. Jur. Trials 99, Social Worker Malpractice for Failure to Protect Foster Children (discovery).

41 Am. Jur. Trials 232, Motorboat Propeller Injury Accidents (discovery).

41 Am. Jur. Trials 586, Computer Technology in Civil Litigation (discovery of computer evidence).

CJS.

27 C.J.S., Discovery §§ 153-155, 169, 170 et seq.

Law Reviews.

1989 Mississippi Supreme Court Review: Discovery Sanctions. 59 Miss. L. J. 803, Winter, 1989.

§ 11-1-52. Limitations on charges permitted for photocopying patients' records by medical provider; physicians to make reasonable charges for depositions; limitations on charges permitted for execution of patient-requested medical record affidavit by medical provider; medical providers to comply with HIPAA.

(1) Any medical provider or hospital or nursing home or other medical facility shall charge no more than the following amounts to patients or their representatives for photocopying any patient's records: Twenty Dollars ($20.00) for pages one (1) through twenty (20); One Dollar ($1.00) per page for the next eighty (80) pages; Fifty Cents (50¢) per page for all pages thereafter. Ten percent (10%) of the total charge may be added for postage and handling. Fifteen Dollars ($15.00) may be recovered by the medical provider or hospital or nursing home or other medical facility for retrieving medical records in archives at a location off the premises where the facility/office is located.

(2) A physician shall only charge normal, reasonable and customary charges for a deposition related to a patient that the physician is treating or has treated.

(3) Any medical provider, hospital, nursing home or other medical facility shall charge no more than Twenty-five Dollars ($25.00) for executing a medical record affidavit, when the affidavit is requested by the patient or the patient's representative.

(4) In charging the fees authorized under subsection (1) of this section, the medical provider, hospital, nursing home or other medical facility shall comply with the federal Health Insurance Portability and Accountability Act (HIPAA).

HISTORY: Laws, 2004, 1st Ex. Sess., ch. 2, § 1; Laws, 2006, ch. 588, § 1, eff from and after passage (approved Apr. 21, 2006.).

JUDICIAL DECISIONS

1. Unconscionability.

Provision in a nursing home's admission agreement setting the costs for requested copies at $ 3 per page was in violation of the law; hence, a court ordered the provision stricken from the admission agreement. Trinity Mission Health & Rehab. of Clinton v. Estate of Scott, 19 So. 3d 735, 2008 Miss. App. LEXIS 11 (Miss. Ct. App. 2008).

Pursuant to Miss. Code Ann. § 11-1-52(1), certain clauses had to be stricken from the admissions agreement as they were unconscionable; thus, the trial court erred in finding the entire admissions agreement to be unenforceable and in denying the nursing home's motion to compel arbitration. Trinity Mission of Clinton, LLC v. Barber, 988 So. 2d 910, 2007 Miss. App. LEXIS 550 (Miss. Ct. App. 2007).

OPINIONS OF THE ATTORNEY GENERAL

Section 11-1-52 limits collection of copying fees from "patients or their representative"; the county medical examiner/investigator is not the patient or her representative and has the authority, pursuant to Section 41-61-63(2)(a), to inspect and copy medical records of a decedent. Meredith, Jan. 20, 2006, A.G. Op. 06-0611.

§ 11-1-53. Harrison County; commencement of civil actions, change of venue and transfer of cases between districts.

In Harrison County, a county having two (2) judicial districts, all civil actions shall be commenced in each of the two (2) judicial districts against defendants as if each district were a separate county, and a change of venue from either of such districts to the other, and from either district to any county of the state, and from any county to either of said districts, shall be made according to the procedure provided for by the Mississippi Rules of Civil Procedure; and the jurisdiction of said courts of said districts shall be the same as if each district were a separate county; provided, however, that any suit or action which may be brought in either of said districts may be commenced by filing a declaration or complaint or other pleading with the clerk of said courts at either Gulfport or Biloxi, and the said clerk shall issue process thereon, returnable to the court of the proper district, and shall deposit the papers in the case in the office of the proper district; and provided further, that no suit or action shall be dismissed because of the fact that the defendant may be sued in the wrong district, but said case or cause shall, upon motion, be transferred for disposition to the proper district and court thereof.

HISTORY: Codes, 1942, § 2910-14; Laws, 1962, ch. 257, § 14; Laws, 1991, ch. 573, § 13, eff from and after July 1, 1991.

Cross References — Change of venue in jury cases in chancery court, see § 11-5-5.
Change of venue in counties having two judicial districts, see § 11-11-59.
Rule governing change of venue, see Miss. R. Civ. P. 82.

§ 11-1-54. Assessment for filing frivolous claims.

If a party files any pleading in a civil action which in the opinion of the court is frivolous, the court may impose an assessment of not more than One Thousand Dollars ($1,000.00) against each party and attorney of record for the party filing the pleading. Such assessment shall be in addition to any other assessments, penalties or sanctions authorized by law or otherwise. The proceeds of any assessment imposed under this section shall be paid to the Mississippi Volunteer Lawyers Project, Inc.

HISTORY: Laws, 2002, 3rd Ex. Sess., ch. 4, § 13, eff from and after Jan. 1, 2003.

RESEARCH REFERENCES

Law Reviews.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

§ 11-1-55. Authority to impose condition of additur or remittitur.

The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

HISTORY: Codes, 1942, § 1686.5; Laws, 1971, ch. 396, § 1; Laws, 1972, ch. 411, § 1, eff from and after passage (approved April 27, 1972).

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Procedure in supreme court for motions to correct judgment or retax cost, see Miss. R. App. P. 36.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular cases—Additur.
3. —Remittitur.

1. In general.

Any party aggrieved by the amount of damages awarded pursuant to a jury verdict is allowed to file a motion for additur or remittitur under Miss. Code Ann. § 11-1-55. Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 2007 Miss. LEXIS 14 (Miss. 2007).

If the trial judge grants a motion for an additur or remittitur, such grant of an additur or remittitur is to take effect only if accepted by all the parties; if all the parties do not agree, then each has the right to either demand a new trial on damages or appeal the order asserting an abuse of discretion on the part of the trial judge. Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 2007 Miss. LEXIS 14 (Miss. 2007).

Where plaintiff driver was injured when defendant driver struck him from the rear, the record showed he was examined following the accident and was not found to have had any skeletal injuries, that he returned to work the next day, and that not until two months later did he complain of shoulder or neck pain, which was treated with manipulative therapy and anti-inflammatory medications. The record also showed that he had two other work related accidents before filing suit almost three years after the accident;

thus, where he obtained a verdict for $ 1500, representing his medical expenses and other minor expenses on the date of the accident, the trial court did not abuse its discretion in denying an additur for medical costs incurred after the accident or lost wages. Colville v. Davidson, 934 So. 2d 1028, 2006 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 933 So. 2d 982, 2006 Miss. LEXIS 382 (Miss. 2006).

Appellate court held that the trial court did not err in rejecting the facility's request for remittitur or company's request for an additur under Miss. Code Ann. § 11-1-55 as the jury's calculation of profits appeared to be based on the evidence. Benchmark Health Care Ctr., Inc. v. Cain, 912 So. 2d 175, 2005 Miss. App. LEXIS 715 (Miss. Ct. App. 2005).

A plaintiff dissatisfied with the amount of recovery, even as enhanced by an additur, may not demand a new trial. Edelen v. Jackson Coca-Cola Bottling Co., 782 So. 2d 1256, 2001 Miss. App. LEXIS 26 (Miss. Ct. App. 2001).

The trial court was obligated to order a new trial 30 days after entry of an additur order where the defendant failed to affirmatively accept the additur during that period. Edelen v. Jackson Coca-Cola Bottling Co., 782 So. 2d 1256, 2001 Miss. App. LEXIS 26 (Miss. Ct. App. 2001).

A defendant has 30 days from the date of entry of an order granting additur to accept the additur, reject the additur and request a new trial, or file an appeal; further, where the defendant takes no action within those 30 days, the trial court must proceed with a new trial on damages. Estate of Berry v. Dahlem, 741 So. 2d 932, 1999 Miss. LEXIS 207 (Miss. 1999).

It is primarily province of jury to determine amount of damages to be awarded, and award will normally not be set aside unless it is so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount, and outrageous. Lewis v. Hiatt, 683 So. 2d 937, 1996 Miss. LEXIS 632 (Miss. 1996).

Party seeking additur must prove his injuries, damages and loss of income; in deciding if burden has been met, court must look at evidence in light most favorable to party in whose favor jury decided, granting that party any favorable inferences that may reasonably be drawn therefrom. Lewis v. Hiatt, 683 So. 2d 937, 1996 Miss. LEXIS 632 (Miss. 1996).

Award of $8,000 in damages for wrongful death of 17-year-old youth who died of accidental gunshot wound was neither unreasonable nor outrageous in light of considerable evidence that youth was almost entirely responsible for bringing about his own death, which occurred after he and friends had been playing with gun. Lewis v. Hiatt, 683 So. 2d 937, 1996 Miss. LEXIS 632 (Miss. 1996).

Abuse of discretion standard applies to Supreme Court's review of a trial judge's denial of a motion for additur. McBride v. Chevron U.S.A., 673 So. 2d 372, 1996 Miss. LEXIS 132 (Miss. 1996), modified, 1996 Miss. LEXIS 271 (Miss. May 23, 1996).

In order to remand case for an additur on damages, Supreme Court must find that the jury was biased or prejudiced or that the verdict was against overwhelming weight of the evidence. McBride v. Chevron U.S.A., 673 So. 2d 372, 1996 Miss. LEXIS 132 (Miss. 1996), modified, 1996 Miss. LEXIS 271 (Miss. May 23, 1996).

The Supreme Court will not vacate or reduce award of damages unless it is so out of line as to shock conscience of court. Ross-King-Walker, Inc. v. Henson, 672 So. 2d 1188, 1996 Miss. LEXIS 128 (Miss. 1996).

For purposes of statute allowing court to impose remittitur, "overwhelming weight of the credible evidence" standard is objective standard. Terex Corp. v. Ingalls Shipbuilding, 671 So. 2d 1316, 1996 Miss. LEXIS 129 (Miss. 1996).

In a new trial on damages only, which was ordered by the trial court in a personal injury action after the defendant refused to accept the trial court's additur, the plaintiff was not required to prove a causal connection between the defendant's negligence and his damages; the plaintiff had made the requisite connecting proof in the original trial, and § 11-1-55 does not require a plaintiff to "rerun the gauntlet." Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

Where a trial court has granted an additur or, in the alternative, a new trial on the issue of damages only, the defendant only may elect (1) to reject the additur and have the case retried on the issue of damages only, (2) to appeal to the Supreme Court on grounds that the trial court should not have granted the additur at all or, alternatively, that the additur granted was legally excessive, or (3) to accept the additur and pay the judgment; the plaintiff can only appeal to the Supreme Court arguing that the trial court abused its discretion and that the additur is legally inadequate. Odom v. Roberts, 606 So. 2d 114, 1992 Miss. LEXIS 559 (Miss. 1992).

Where a trial court has granted a remittitur or, in the alternative, a new trial on the issue of damages only, the plaintiff only may elect (1) to reject the remittitur and have the case retried on the issue of damages only, (2) to appeal to the Supreme Court on grounds that the circuit court should not have granted the remittitur at all or, alternatively, that the remittitur granted was legally excessive, or (3) to accept the remittitur; in such a case, the defendant's only procedural avenue is to appeal to the Supreme Court arguing that the trial court abused its discretion and that the remittitur was legally inadequate. Odom v. Roberts, 606 So. 2d 114, 1992 Miss. LEXIS 559 (Miss. 1992).

Where a trial court has denied a remittitur, the defendant may appeal to the Supreme Court on grounds that the trial court abused its discretion in failing to order the remittitur and, if the defendant can convince the Supreme Court on that score, the defendant may argue that the damage award be reduced to such an amount as would no longer be contrary to the overwhelming weight of the credible evidence; if the defendant should be successful, the plaintiff would then have the option of accepting the remittitur or going to trial again on the issue of damages only. Odom v. Roberts, 606 So. 2d 114, 1992 Miss. LEXIS 559 (Miss. 1992).

Where a trial court has denied a plaintiff's motion for an additur, the plaintiff may appeal on grounds that the trial court abused its discretion in failing to order an additur, whereupon it becomes incumbent upon the Supreme Court, if it finds that the trial court did abuse its discretion, to order an additur up to the point where the verdict is no longer so low that it is contrary to the overwhelming weight of the credible evidence; the right to accept the additur (and pay the judgment) on pain of a new trial on damages only lies exclusively with the defendant. Odom v. Roberts, 606 So. 2d 114, 1992 Miss. LEXIS 559 (Miss. 1992).

The scope of appellate review under § 11-7-213[Repealed] is limited to determining whether the trial court abused its discretion in granting a motion for new trial where the plaintiff refuses to accept an additur. State Highway Com. v. Warren, 530 So. 2d 704, 1988 Miss. LEXIS 422 (Miss. 1988).

Additurs represent a judicial incursion into the traditional habitat of the jury and, therefore, should never be employed without great caution. Gibbs v. Banks, 527 So. 2d 658, 1988 Miss. LEXIS 294 (Miss. 1988).

Statute gives party right to present cross-appeal notwithstanding his acceptance of remittitur in Circuit Court, so action of accepting remittitur does not constitute waiver of right to complain of remittitur on appeal. Life Ins. Co. v. Allen, 518 So. 2d 1189, 1987 Miss. LEXIS 2975 (Miss. 1987).

Trial judge's authority to enter a remittitur or an additur exists where the nature of the damage award at issue is punitive or exemplary. Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 1985 Miss. LEXIS 2229 (Miss. 1985), aff'd, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62, 1988 U.S. LEXIS 2204 (U.S. 1988).

Motions challenging quantum of punitive damages and seeking either remittitur or additur are subject to same rules as motions challenging amount of damage awards generally. Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 1985 Miss. LEXIS 2229 (Miss. 1985), aff'd, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62, 1988 U.S. LEXIS 2204 (U.S. 1988).

When a defendant does not accept an additur and appeals from an order granting a new trial because of inadequate damages, the scope of review on appeal is limited to the question of whether the trial court abused its discretion in granting a new trial. Screws v. Parker, 365 So. 2d 633, 1978 Miss. LEXIS 2425 (Miss. 1978).

Before allowing an additur to a jury verdict for damages, the trial court must determine that the jury verdict was so inadequate under the facts of the case as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as to manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. Standard Products, Inc. v. Patterson, 317 So. 2d 376, 1975 Miss. LEXIS 1735 (Miss. 1975).

Where the court finds the damages are inadequate and orders an additur, this impinges on the right to trial by jury, and the defendant has the option of agreeing to pay the added amount beyond that which the jury gave, or submitting to a new trial on the question of damages only. Altom v. Wood, 298 So. 2d 700, 1974 Miss. LEXIS 1565 (Miss. 1974), overruled, Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 2007 Miss. LEXIS 14 (Miss. 2007).

The same rule applies in determining whether an additur is proper as applies in determining if the amount of damages awarded is excessive. Smith v. Washam, 288 So. 2d 20, 1974 Miss. LEXIS 1837 (Miss. 1974).

Although, unlike remittitur, the theory and practice of which have been a part of our jurisprudence for many years, the power of additur is new to the courts of Mississippi, but the legal principles involved with additur are the same as those involved with remittitur. Biloxi Electric Co. v. Thorn, 264 So. 2d 404, 1972 Miss. LEXIS 1360 (Miss. 1972).

2. Particular cases—Additur.

Circuit court did not abuse its discretion in denying a motor vehicle accident victim's motion for an additur because the amount of the jury's award of damages to the victim was not so inadequate as to shock the conscience and to indicate bias, passion, and prejudice on the part of the jury. Stockett v. Classic Manor Builders, Inc., 226 So. 3d 620, 2017 Miss. App. LEXIS 536 (Miss. Ct. App. 2017).

Circuit court properly awarded damages to an injured passenger and, inter alia, denied his motion for an additur because there was ample evidentiary support for the verdict returned by the jury where it was presented with the passenger's conflicting sworn testimony concerning his prior medical condition and previous injuries, and evidence that called into question the credibility of the expert-medical testimony presented on his behalf. Reel v. Warren, 232 So. 3d 736, 2017 Miss. App. LEXIS 302 (Miss. Ct. App.), cert. denied, 229 So. 3d 713, 2017 Miss. LEXIS 502 (Miss. 2017).

In an inverse condemnation proceeding, it was not error to deny a landowner's motion for additur because substantial evidence supported the jury's award. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046, 2016 Miss. LEXIS 282 (Miss. 2016), cert. denied, — U.S. —, 137 S. Ct. 2002, 198 L. Ed. 2d 750, 2017 U.S. LEXIS 4057 (U.S. 2017).

Trial court did not err in denying a motion for additur where the jury awarded plaintiff approximately $3,000 less than requested, there was testimony that called into question some of plaintiff's claims damages, and the jury was instructed to consider plaintiff's negligence in its determination of damages. Wetzel v. Sears, 214 So. 3d 1092, 2016 Miss. App. LEXIS 286 (Miss. Ct. App. 2016), cert. denied, — So. 3d —, 2017 Miss. LEXIS 101 (Miss. 2017).

Trial court's finding that a jury could have found that plaintiff's injuries in an automobile accident did not warrant medical treatment over and above what was received at the emergency room supported the denial of additur and did not constitute an abuse of discretion. Crowell v. Burchfield, 168 So. 3d 1052, 2013 Miss. App. LEXIS 666 (Miss. Ct. App. 2013).

In a personal injury action involving a rear-end vehicle collision, a trial court did not abuse its discretion by denying a motion for an additur by driver 1, who was in the stopped vehicle, was not an abuse of discretion because while driver 1's medical bills established a presumption that those bills were reasonable and necessary for the treatment of her injuries, the medical bills were not prima facie evidence that the accident was the proximate cause of driver 1's injuries. Downs v. Ackerman,

115 So. 3d 785, 2013 Miss. LEXIS 350 (Miss. 2013).

Trial court did not abuse its discretion in denying a subcontractor's (SC's) motion for additur, Miss. Code Ann. § 11-1-55, in the SC's breach of contract action against a general contractor (GC), wherein the jury awarded the SC $ 41,500 rather than the $ 165,068.82 sought by the SC, because the GC disputed the $ 80,993.82 in costs presented by the SC, challenged the alleged $ 84,075 lost profits and the reasonableness of a near ten percent profit, and the award was not so inadequate as to shock the conscience. DC General Contractors, Inc. v. Slay Steel, Inc., 109 So. 3d 577, 2013 Miss. App. LEXIS 50 (Miss. Ct. App. 2013).

In a personal injury action, the trial court did not err in failing to impose an additur, pursuant to Miss. Code Ann. § 11-1-55 (Rev. 2002), because the defendant provided sufficient evidence in support of its case from which the jury could have reasonably concluded that the plaintiff's personal injuries were not caused by the defendant's negligence. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547, 2011 Miss. App. LEXIS 240 (Miss. Ct. App. 2011).

Law was clear that the stopped driver was entitled to all past, present, and future medical damages caused by the other driver's negligence and the trial court erred in denying the stopped driver's motion for a new trial on the sole issue of damages. The discrepancy between the amount of damages that the stopped driver requested and the much lower verdict, coupled with the continuous requests from the jury while in deliberation, suggested that the jury was confused by the jury instructions or departed from its oath, and that the verdict was a result of bias, passion, and prejudice. Thompson v. Nguyen, 86 So. 3d 251, 2011 Miss. App. LEXIS 44 (Miss. Ct. App. 2011), rev'd, 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012).

In an action for damages, where here was no finding that the jury was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence, the trial court abused its discretion in ordering additur under Miss. Code Ann. § 11-1-55 (Rev. 2002). Evidence supported the jury's verdict and the verdict was not so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous. Miss. State Fedn. of Colored Women's Club Hous. for the Elderly in Clinton, Inc. v. L. R., 62 So. 3d 351, 2010 Miss. LEXIS 657 (Miss. 2010).

In a negligent entrustment action, the appellate court lacked jurisdiction to hear the owner of an utility terrain vehicle's appeal of a motion for judgment notwithstanding the verdict before the trial court had an opportunity to rule on the injured passenger's second request of a new trial on damages following her rejection of a proposed additur. Davis v. Walters, 54 So. 3d 272, 2010 Miss. App. LEXIS 221 (Miss. Ct. App. 2010), cert. dismissed, 2011 Miss. LEXIS 106 (Miss. Feb. 17, 2011).

Trial court's order granting the additur simply found that the motion was well taken and should have been granted, but the trial court's failure to indicate its specific findings in granting the additur was an abuse of discretion; however, that did not preclude the trial court, on remand, from granting the additur. Rather, if the trial court chose so, there had to be adequate findings to support the additur, and thus, the appellate court remanded the case to the trial court to either reinstate the jury's verdict or consider the additur in accordance with the applicable statutory guidance. J. Criss Builder, Inc. v. White, 35 So. 3d 541, 2009 Miss. App. LEXIS 698 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 266 (Miss. 2010).

Trial court did not err in not granting an additur to plaintiff in a personal injury action against the Mississippi DOT after a vehicle that plaintiff was traveling in was struck by a rock that was thrown from a MDOT employee bushhogging along the highway because plaintiff's physician never unequivocally stated that the accident accelerated plaintiff's need to have a total knee replacement. Potts v. Miss. DOT, 3 So. 3d 810, 2009 Miss. App. LEXIS 85 (Miss. Ct. App. 2009).

Amount awarded by the jury to each wrongful death beneficiary on their respective claim of loss of society and companionship was not against the great weight of the evidence presented during the second trial of the case and the jury verdict was not tainted as a result of bias, prejudice, or passion, so the beneficiaries' request to increase the jury verdict, either through altering the judgment, additur, or new trial had to be denied. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 21012 (S.D. Miss. 2008).

In an injured party's negligence suit against a driver regarding an automobile accident, where the jury returned a verdict in favor of the injured party for $50,000, it was not an abuse of discretion to deny the injured party's motion for a new trial or, in the alternative, an additur, because there was substantial evidence in the record to support the jury's verdict based on, inter alia, the severity of the impact and the injured party's conduct. Dobbins v. Vann, 981 So. 2d 1041, 2008 Miss. App. LEXIS 273 (Miss. Ct. App. 2008).

Denial of the appellant driver's motion for an additur in her action against the appellee driver for damages stemming from an accident was proper because the jury's award was not erroneous simply because the jury did not believe that appellant sustained over $40,000 in damages as a result of her accident with appellee. Crews v. Mahaffey, 986 So. 2d 987, 2007 Miss. App. LEXIS 827 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 372 (Miss. 2008).

In an injured passenger's suit arising from a three-vehicle accident, by rejecting the circuit court's additur under Miss. Code Ann. § 11-1-55, the driver and the insurer effectively opted for a new trial on damages; because that new trial on damages had yet to occur, there was no final judgment, and the matter was not ripe for appellate review. Henson v. Riggenbach, 982 So. 2d 432, 2007 Miss. App. LEXIS 712 (Miss. Ct. App. 2007).

In a personal injury case, a trial court did not abuse its discretion in denying a motion for an additur under Miss. Code Ann. § 11-1-55 where, although it was undisputed that an injured party had a physical impairment and pain and suffering due to a fall, a property owner introduced contradictory evidence as to the amount of damages; most of the injured party's testimony had been impeached through several sources, such as other witnesses and recordings of his activities. Quinn v. President Broadwater Hotel, LLC, 963 So. 2d 1204, 2007 Miss. App. LEXIS 286 (Miss. Ct. App. 2007).

Because an expert in an eminent domain action had little or no knowledge as to the valuation of a business sign based on the cost approach, his testimony based on a quote from a sign company should have been stricken since he was merely acting as a conduit for hearsay about another expert's opinion, in violation of Miss. R. Evid. 703; however, additur was not an appropriate remedy in this case because the jury verdict was based on inadmissible evidence. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163, 2007 Miss. App. LEXIS 225 (Miss. Ct. App. 2007).

Additur was not appropriate in an eminent domain case because the damages awarded to two land owners were not contrary to the overwhelming weight of the evidence; the admissibility of an expert's opinion regarding the value of the land was waived, so the jury properly took into account the valuation evidence presented by both parties in making its decision. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163, 2007 Miss. App. LEXIS 225 (Miss. Ct. App. 2007).

In an action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S. §§ 621-634, where the appellate court held that the former employee was entitled to prejudgment and post-judgment interest, the appellate court also found that contrary to the employer's assertion that the former employee was entitled to 35 months of back pay, the period of entitlement was 47 months. Therefore, an additur in the latter respect was warranted, and on remand, the trial court was also to consider what additur, if any, was required to reimburse the former employee for lost insurance and vacation benefits. Cash Distrib. Co. v. Neely, 947 So. 2d 317, 2006 Miss. App. LEXIS 6 (Miss. Ct. App. 2006), aff'd, 947 So. 2d 286, 2007 Miss. LEXIS 23 (Miss. 2007).

Due to its failure to affirmatively accept an additur within 30 days of the trial court's order, a vehicle owner effectively acceded to a new trial limited to damages only where (1) the record revealed that the trial judge's intent was to condition the denial of a motion for a new trial upon the owner's acceptance of the additur, (2) the record was silent as to whether the owner affirmatively accepted or rejected the additur within the requisite time period, and (3) there was no evidence in the record to suggest that the owner ever paid the judgment as ordered by the trial judge. Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 961, 2005 Miss. App. LEXIS 442 (Miss. Ct. App. 2005), aff'd, 947 So. 2d 900, 2007 Miss. LEXIS 14 (Miss. 2007).

In a medical malpractice case, doctors were liable for leaving a five-inch hemostat in the patient's body during surgery. The jury properly awarded damages to the patient in the amount of $ 10, 000, which exceeded the cost of the surgery to remove the hemostat; the patient was not entitled to an additur. Williams v. Gamble, 912 So. 2d 1053, 2005 Miss. App. LEXIS 249 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 677 (Miss. 2005).

Jury properly awarded zero damages because there was more than sufficient evidence to justify a finding that tenants had either failed to mitigate their damages, or that their purchase of a home with a long-term mortgage was not a reasonably foreseeable consequence of the property management company's negligence in telling the tenants that they would have to move from the apartment complex, or both; thus, under Miss. Code Ann. § 11-1-55, the court affirmed the trial court's order denying the tenant's post-trial motion for an additur, or alternatively, a new trial on damages. Patterson v. Liberty Assocs., L.P., 910 So. 2d 1014, 2004 Miss. LEXIS 1456 (Miss. 2004).

Where decedent was killed by a tractor trailer while attempting to cross a two-lane highway, the jury found the driver of the tractor trailer and his company 30% at fault and awarded plaintiff $ 81,000. Plaintiff's motion for judgment notwithstanding the verdict on damages only or, in the alternative, for a new trial on damages, was properly denied; the jury was not confused in determining damages and liability. Wells v. Tru-Mark Grain, Inc., 895 So. 2d 181, 2004 Miss. App. LEXIS 1085 (Miss. Ct. App. 2004).

In a property owner's trespass suit against a construction company which removed trees from his property, the trial court did not err by denying the property owner's post-trial motion for an additur because the verdict was supported by the evidence and in no way evinced bias, prejudice or passion on the part of the jury. Teasley v. Buford, 876 So. 2d 1070, 2004 Miss. App. LEXIS 617 (Miss. Ct. App. 2004).

In a premises liability case, while a trial court did not comply with the technical requirements of Miss. Code Ann. § 11-1-55 when it granted additur, in that it did not explicitly find that the jury's damage award was against the overwhelming weight of the evidence, it was reasonable to conclude from the trial court's order that the court nonetheless found the award inadequate for this reason, and the statute allowed the Supreme Court to make this finding. Gaines v. K-Mart Corp., 860 So. 2d 1214, 2003 Miss. LEXIS 821 (Miss. 2003).

In a trial to set value for landowners' property taken by the State, the evidence presented – including videotapes and photographs of the owners' property, plus testimony from three different experts in relevant fields – all provided substantial evidence to support the jury award to the landowners, and the trial court did not abuse its discretion in denying the landowners' motion for additur or new trial. Gautier v. Miss. Transp. Comm'n, 839 So. 2d 588, 2003 Miss. App. LEXIS 154 (Miss. Ct. App. 2003).

The trial court properly granted additur in an action to recover for injuries sustained in a motor vehicle accident where the plaintiff presented evidence of over $6,000 in medical bills, but the jury awarded only $400, since the defendant failed to rebut the reasonableness of the plaintiff's medical bills where she relied on speculation and attempts to attack the credibility of the plaintiff's witnesses, but failed to present any testimony that showed that the medical bills were unfair, unreasonable, or unnecessary. Boggs v. Hawks, 772 So. 2d 1082, 2000 Miss. App. LEXIS 559 (Miss. Ct. App. 2000).

The court affirmed upon condition of acceptance of additur by the defendant where the jury verdict did not fully compensate the plaintiff for his medical expenses or allow anything for pain and suffering and the defendant failed to rebut the reasonableness and necessity of the plaintiff's medical bills and, instead, her attorney inflamed the jury with arguments for which he had no evidentiary support. Hubbard v. Canterbury, 805 So. 2d 545, 2000 Miss. App. LEXIS 143 (Miss. Ct. App. 2000).

The trial court did not err in refusing to order additur in an action arising from an automobile accident where the issue of the existence of meaningful physical injury or pain and suffering was disputed. Rose v. Clenney, 748 So. 2d 172, 1999 Miss. App. LEXIS 455 (Miss. Ct. App. 1999).

The court directed a new trial on damages unless the defendants accepted an additur of $10,000 where (1) the jury's award of $2,900 was only $65 more than the plaintiff's medical expenses, and (2) after reduction for comparative fault, the award was less than the medical expenses and left nothing for pain and suffering. Maddox v. Muirhead, 738 So. 2d 742, 1999 Miss. LEXIS 141 (Miss. 1999).

A jury award of $5,000 was appropriate therefore, additur was not proper where (1) the plaintiff had no visible injuries at the time of the accident, stated that he was not hurt, did not see a doctor until 11 days afterwards, and had total medical bills of $1,579.50, (2) there was no evidence regarding the cost of repairs made to the plaintiff's car, (3) post-accident surgery to re-sect the plaintiff's sternoclavicular joint may not have related to the accident (4) the additur appeared to have been granted based on the trial judge's pre-trial evaluation of the case, as well as his admitted "disgust" with the jury for only deliberating 20 minutes. Anne Cook Interior Designs v. Sanders, 733 So. 2d 187, 1998 Miss. LEXIS 630 (Miss. 1998).

In an incident in which a truck rear-ended a car, the trial court correctly awarded an additur of $140,000 to the jury's verdict of $67,000 because the jury was obviously influenced by bias, prejudice, or passion and the damages were contrary to the overwhelming weight of credible evidence which showed over $42,000 in medical bills, loss of wages from the date of the accident until the end of trial of more than $82,000, which coupled with a life expectancy of 22.9 years would result in a future income loss of $297,000. Jack Gray Transp., Inc. v. Taylor, 725 So. 2d 898, 1998 Miss. LEXIS 314 (Miss. 1998).

Trial judge did not abuse discretion in denying motion for additur by worker who sued oil company to recover for injuries suffered in drilling accident, was found by jury to have suffered $500,000 in damages, and was also determined to have been 75% at fault as between himself and oil company; there was nothing in the record to indicate jury was biased or prejudiced, while the finding on worker's own negligence was supported by testimony that he was perhaps standing too close to the operation, and the finding as to total damages was not against overwhelming weight of the evidence. McBride v. Chevron U.S.A., 673 So. 2d 372, 1996 Miss. LEXIS 132 (Miss. 1996), modified, 1996 Miss. LEXIS 271 (Miss. May 23, 1996).

Compensatory award of $1,000 in plaintiff's suit for assault, invasion of privacy, and negligence against bail bondsmen who entered her apartment was not against the weight of the evidence and was not the product of bias, passion, or prejudice, and thus plaintiff was not entitled to additur; plaintiff put on no proof of the severity of her injuries, nor of lost wages or other damages. Wallace v. Thornton, 672 So. 2d 724, 1996 Miss. LEXIS 58 (Miss. 1996).

A personal injury plaintiff was entitled to an additur in the amount of $2,000 where there was uncontradicted testimony that his knee injury caused him pain and suffering and had resulted in a 10 percent impairment to his left leg, and the jury's verdict was only $20.80 over his alleged special damages. Harvey v. Wall, 649 So. 2d 184, 1995 Miss. LEXIS 29 (Miss. 1995).

A personal injury plaintiff was entitled to an additur in the amount of $11,765.50

where the jury awarded the plaintiff $11,762.50 which was the exact amount of his medical expenses, and the plaintiff had put on proof that his damages included not only medical expenses but also some pain and suffering. Rodgers v. Pascagoula Public School Dist., 611 So. 2d 942, 1992 Miss. LEXIS 825 (Miss. 1992).

A trial court in a personal injury action did not err when it ordered an additur of $400,000 where the court found calculable lost wages, fringe benefits and past medical expenses approaching $1,178,000, and the jury returned a general verdict for the plaintiff in the amount of $100,000. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

A trial court did not err in failing to grant an additur to the plaintiff in a negligence action arising from an automobile collision in which the defendant rear-ended the plaintiff even though the amount of the verdict was less than half of the plaintiff's medical expenses, where the plaintiff also sustained injuries in a second automobile accident six months after the first accident, the plaintiff drove away from the first accident but was transported to the hospital in an ambulance after the second accident, the plaintiff's chiropractor testified that the plaintiff had recovered considerably from the first accident and had no complaints of pain immediately preceding the second accident, the plaintiff sought only chiropractic treatment after the first accident but underwent a series of diagnostic tests, chiropractic treatment, and visits to medical doctors after the second accident, and the plaintiff produced no documentation verifying employment or rate of pay. Brake v. Speed, 605 So. 2d 28, 1992 Miss. LEXIS 418 (Miss. 1992).

A plaintiff in a personal injury action was not entitled to an additur under § 11-1-55 to increase a $2,000 damages award, even though the plaintiff had introduced medical bills incurred in the treatment of his injuries which totalled $2,085.90 and he claimed that the jury had failed to consider his claims for pain, suffering and lost wages, where it was apparent that the jury believed that the plaintiff was somewhat responsible for his own injuries and accordingly reduced his award of damages to the amount of $2,000; a determination that the jury was incorrect in assessing the plaintiff's contributory negligence would be tantamount to holding that a jury is to be instructed that it must return a verdict for all alleged damages, which is not a proper statement of the law. Leach v. Leach, 597 So. 2d 1295, 1992 Miss. LEXIS 217 (Miss. 1992).

A personal injury plaintiff was entitled to an additur of $10,000 where the $3,000 jury verdict was less than $600 above the plaintiff's actual medical expenses and there was undisputed medical evidence that the plaintiff had suffered a very disabling back injury. Brown v. Cuccia, 576 So. 2d 1265, 1991 Miss. LEXIS 95 (Miss. 1991).

An additur of $30,000 to a jury finding of $30,000 was required where the injured plaintiff proved special damages in the amount of $28,682.70, the plaintiff received considerable injuries from the accident, including a deep tear in his kidney and a laceration of the liver and spleen, and, several months after the accident, the plaintiff had a limp and complained of pain in his leg and tenderness in his thigh area, since the jury's finding obviously ignored the categories of past and future pain and suffering and permanent partial disability. Pham v. Welter, 542 So. 2d 884, 1989 Miss. LEXIS 148 (Miss. 1989).

Trial court did not erred in denying motion for additur or, in alternative, new trial, where it could not be said that jury's verdict either evinced bias, prejudice, or passion, or was contrary to overwhelming weight of credible evidence, where there was substantial evidence to support jury's resolution of factual disputes. Bass v. Montgomery, 515 So. 2d 1172, 1987 Miss. LEXIS 2910 (Miss. 1987).

Judgment of circuit court granting additur was proper where jury award of $1000 was so inadequate to "strike mankind at first blush as being unreasonable and outrageous", and additur of $2000 was proper exercise of discretion considering testimony that plaintiff had pre-existing degenerative vertebra condition, or osteoarthritis condition. James v. Jackson, 514 So. 2d 1224, 1987 Miss. LEXIS 2872 (Miss. 1987).

The trial court properly ordered additur under § 11-1-55 where it was evident that the jury failed to compensate defendant for the pain and suffering and permanent impairment sustained by him. City of Jackson v. Ainsworth, 462 So. 2d 325, 1984 Miss. LEXIS 2057 (Miss. 1984).

Additur would be entered increasing judgment for a personal injury victim to $3,000, where defendant admitted liability for the accident, and where the jury verdict of $364 in damages was inadequate and contrary to the weight of the evidence, which included uncontradicted evidence of actual damages consisting of $285, as well as plaintiff's testimony concerning problems she had had since the collision, further medical bills, and 52 days lost from work as a bus driver. Polk v. Amoco Production Co., 430 So. 2d 417, 1983 Miss. LEXIS 2566 (Miss. 1983).

In an eminent domain proceeding under § 11-27-83 in which the state acquired .18 of an acre of land leased by a church, the trial court erred in ordering a $10,000 additur to the jury verdict of $7,500 where the church would not lose any building or permanent structure on the taken property, the state had no plans to pave the land taken or place any structure upon it, the highest and best use of the property was for church purposes and not for commercial purposes, and the land taken was property in which the church only held a remaining 20-year leasehold interest. Mississippi State Highway Com. v. Antioch Baptist Church, Inc., 392 So. 2d 512, 1981 Miss. LEXIS 1900 (Miss. 1981).

In a personal injury action by a railroad employee against his employer and a company through whose property the railroad had a right of way, a jury verdict of $23,052.21 would be increased to $50,000 where the evidence established that the plaintiff had been a switchman for the railroad for all his working life, that he had an eighth-grade education, that his injuries prevented him from doing heavy physical work, that he had continually failed despite numerous attempts to find any employment, and that, since his injury, he had lost $89,368.68 in wages; however, because the jury had found the plaintiff to be 50 percent contributorily negligent, the total verdict of $50,000 would be reduced to $25,000. Cash v. Illinois C. G. R. Co., 388 So. 2d 871, 1980 Miss. LEXIS 2410 (Miss. 1980).

In a wrongful death action against a foreign automobile manufacturer and its local dealer, the trial court committed reversible error in awarding an additur increasing the $40,000 jury verdict to $157,894, where it could not be said that the jury verdict was motivated by passion or prejudice in favor of the foreign automobile manufacturer, or against the local plaintiff, and where the verdict was not so grossly inadequate as to shock the conscience or to reflect a manifest miscarriage of justice; the apparent basis for the additur was the judge's acceptance in toto of the testimony of an expert economist. Toyota Motor Co. v. Sanford, 375 So. 2d 1036, 1979 Miss. LEXIS 2466 (Miss. 1979).

In an action for personal injuries sustained in an automobile accident, the trial court abused its discretion in ordering a $20,000 additur to a $35,000 jury verdict, where the record revealed that plaintiff's expenses for medical care and treatment and damage to his truck were less than $3,000, and where his earnings had been reduced as a result of the accident from about $700 to $800 a month to about half that amount. McNair Transport, Inc. v. Crosby, 375 So. 2d 985, 1979 Miss. LEXIS 2411 (Miss. 1979).

Suggestion of additur was appropriate with regard to jury verdict awarding damages of $1,500 for appellant's personal injuries in auto accident where only $940 of damages was assessed for personal injuries, appellant herself had not been negligent, and injuries were painful and included loss of strength and flexibility of one arm. Adams v. Taylor, 325 So. 2d 912, 1976 Miss. LEXIS 1987 (Miss. 1976).

Where plaintiff victim of an automobile collision had an involvement of the intercostal nerve which prolonged her disability and resulted in more than the usual pain from a rib fracture, and special damages proved by the plaintiff were of the total sum of $1,991, a jury verdict of $1,250 was against the overwhelming weight of the evidence even though plaintiff had previously received $1,500 in settlement of her claim against the driver of her vehicle, and the trial court was correct in providing for an additur of $1,750. Smith v. Washam, 288 So. 2d 20, 1974 Miss. LEXIS 1837 (Miss. 1974).

Circuit court did not abuse its discretion in denying a motor vehicle accident victim's motion for an additur because the amount of the jury's award of damages to the victim was not so inadequate as to shock the conscience and to indicate bias, passion, and prejudice on the part of the jury. Stockett v. Classic Manor Builders, Inc., — So. 3d —, 2017 Miss. App. LEXIS 536 (Miss. Ct. App. Sept. 12, 2017). Circuit court properly awarded damages to an injured messenger and, interalia, denied his motion for an additurbe cause there was ample evidentiary support for the verdict returned by the jury where it was presented with the passenger's conflicting sworn testimony concerning his prior medical condition and previous injuries, and evidence that called into question the credibility of the expert-medical testimony presented on his be-half. Reel v. Warren, 232 So. 3d 736, 2017 Miss. App. LEXIS 302 (Miss. Ct. App.), cert. denied, 229 So. 3d 713, 2017 Miss. LEXIS 502 (Miss. 2017).

3. —Remittitur.

Trial court abused its discretion when it denied a company's motion for remittitur because the damages awarded went against the overwhelming weight of the evidence; the jury had no evidentiary basis for finding the company liable for more than four times the subcontractor's claim for unpaid labor and services. Ground Control, LLC v. Capsco Indus., 214 So. 3d 232, 2017 Miss. LEXIS 93 (Miss. 2017).

Trial court abused its discretion when it denied a company's motion for remittitur because the damages awarded went against the overwhelming weight of the evidence; the jury had no evidentiary basis for finding the company liable for more than four times the subcontractor's claim for unpaid labor and services. Ground Control, LLC v. Capsco Indus., 214 So. 3d 232, 2017 Miss. LEXIS 93 (Miss. 2017).

Since the patient was credible and substantiated testimony as to her pain and suffering, testifying that her urine collection bag often leaked causing rashes and embarrassment and she was unable to care for her newborn, the award for pain and suffering which was six-and-a-half times the total special damages was not unreasonable or outrageous and the trial court did not err in denying the doctor's request for remittitur. Robinson v. Corr, 188 So. 3d 560, 2016 Miss. LEXIS 151 (Miss. 2016).

Because the court found that some bills incurred were not necessary and reasonable medical expenses resulting from the accident, it was error to submit those bills to the jury, and an offsetting remittitur was required, and if not accepted, a new trial on damages was necessary. Estate of Miles v. Burcham, 127 So. 3d 213, 2013 Miss. LEXIS 646 (Miss. 2013).

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249, 2013 U.S. App. LEXIS 4035 (5th Cir. Miss. 2013).

Evidence of the driver's fractured vertebrae, ongoing pain, and limitation of her former activities did not warrant setting aside the jury verdict as so excessive to indicate bias, passion and prejudice on the part of the jury; therefore, the trial court did not err in denying the employer a new trial or remittitur. APAC Miss., Inc. v. Johnson, 15 So. 3d 465, 2009 Miss. App. LEXIS 136 (Miss. Ct. App. 2009).

Motion for remittitur, under Miss. Code Ann. § 11-1-55, was properly denied because there was sufficient evidence to preclude a finding that the jury was influenced by bias, passion, and prejudice; the jury's verdict was just over eleven times the economic or special damages amount, and the patient suffered severe, recurring headaches and lived in a persistent vegetative state for almost two years. Estate of Jones v. Phillips, 992 So. 2d 1131, 2008 Miss. LEXIS 420 (Miss. 2008).

Amount awarded by the jury to each wrongful death beneficiary on their respective claim of loss of society and companionship was neither contrary to the overwhelming weight of credible evidence nor contrary to right reason and there was no showing that the jury verdict was the result of bias, prejudice, or passion, so the court found that the jury verdict should not be disturbed, and that the requested remittitur should be denied. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 21012 (S.D. Miss. 2008).

District court, who saw and heard witnesses and who studied and ruled on numerous motions and objections dealing with the evidence, did not abuse its discretion in deciding to deny defendant restaurant operator's new trial remittitur motion because the jury's awards were not contrary to the overwhelming weight of credible evidence. The district court properly instructed the jury on Mississippi law and applied the proper state-law standard in considering whether the verdict returned was excessive. Foradori v. Harris, 523 F.3d 477, 2008 U.S. App. LEXIS 6937 (5th Cir. Miss. 2008).

In alienation of affection action in which the husband was granted $754,500 in damages from his wife's boyfriend, the trial court did not abuse its discretion by denying remittitur because the evidence established that the husband lost his home, physical custody of his child, his marriage and society, companionship, aid, services, support, and the child he believed and raised as his daughter; there was no evidence that the jury was influenced by bias, prejudice, or passion or that the damages were contrary to the overwhelming weight of the evidence. Fitch v. Valentine, 959 So. 2d 1012, 2007 Miss. LEXIS 227 (Miss. 2007), cert. denied, 552 U.S. 1100, 128 S. Ct. 911, 169 L. Ed. 2d 730, 2008 U.S. LEXIS 127 (U.S. 2008).

In a debtor's conversion action against a bank, the trial court abused its discretion in refusing to grant the bank a remittitur on compensatory damages as the compensatory damage award was against the overwhelming weight of credible evidence; the debtor's statement regarding the "rental value" of certain equipment that was taken was insufficient to support a finding of lost profits, and there was overwhelming evidence that the debtor did not own all the property at issue. Cmty. Bank v. Courtney, 884 So. 2d 767, 2004 Miss. LEXIS 1321 (Miss. 2004).

In a property owner's trespass suit against a construction company which removed trees from his property, denial of the company's motion for remittitur was proper as the verdict was supported by the evidence and in no way evinced bias, prejudice or passion on the part of the jury. Teasley v. Buford, 876 So. 2d 1070, 2004 Miss. App. LEXIS 617 (Miss. Ct. App. 2004).

Award of compensatory damages in favor of the borrower in the borrower's action for conversion was against the overwhelming weight of credible evidence; thus, the trial court abused its discretion in refusing to grant a remittitur on compensatory damages. Cmty. Bank v. Courtney, 2004 Miss. LEXIS 656 (Miss. June 10, 2004).

Remittitur was ordered in a case involving an employer's bad faith failure to pay worker's compensation benefits because the punitive damages awarded were excessive where the evidence did not show that the employer's conduct met the required degree of reprehensibility under Miss. Code Ann. § 11-1-65(1)(a). Miss. Power & Light Co. v. Cook, 832 So. 2d 474, 2002 Miss. LEXIS 399 (Miss. 2002).

The trial court did not abuse its discretion in granting a remittitur which reduced the jury's verdict from $30,000 to $7,500 for injuries resulting from a traffic accident where the plaintiff's medical expenses were less than $600 and her treating physician testified that he did not believe the plaintiff would still have pain at the time of the trial and did not expect her to have any future medical expenses, notwithstanding the plaintiff's testimony that she continued to have neck pain and headaches and suffered nervousness and loss of sleep due to the collision. Stringer v. Crowson, 797 So. 2d 368, 2001 Miss. App. LEXIS 226 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, the court refused to order a remittitur where the plaintiff claimed that she incurred medical bills of $569, as well as past, present, and future pain and suffering and mental anguish and she was awarded $29,099 in total damages, or 51 times her medical expenses; though the award was almost three times the greatest multiple found in the cases reviewed by the court, the amount of damages was primarily a concern for the jury and the court therefore deferred to the jury and affirmed the verdict and judgment of the trial court. Cade v. Walker, 771 So. 2d 403, 2000 Miss. App. LEXIS 514 (Miss. Ct. App. 2000).

In an action for assault, battery, and false imprisonment arising from an incident in which the plaintiffs drove their pickup truck across property owned by the defendant and the defendant stopped the truck by firing several shots in the air and then shooting one of the tires, the defendant was not entitled to remittitur where one plaintiff was awarded $50,000 and the other two plaintiffs were each awarded $30,000. Whitten v. Cox, 799 So. 2d 1, 2000 Miss. LEXIS 185 (Miss. 2000).

The court properly granted remittitur in the amount of $112,500 on a jury verdict of $187,500 where (1) the amount of the plaintiff's lost wages were approximately $19,800, so that $167,700 of the verdict was attributable to pain and suffering, (2) the plaintiff told his physician that his back problem was resolved and that he no longer had pain, and (3) the plaintiff went back to full work and only stopped working after being involved in another accident unrelated to the case at bar. Rawson v. Midsouth Rail Corp., 738 So. 2d 280, 1999 Miss. App. LEXIS 67 (Miss. Ct. App. 1999).

Limiting punitive damages to triple amount of actual damages was arbitrary and improper. Ross-King-Walker, Inc. v. Henson, 672 So. 2d 1188, 1996 Miss. LEXIS 128 (Miss. 1996).

In a wrongful death action arising from the death of an 85-year-old man in an automobile collision, a jury verdict in the amount of $150,000 comported with the evidence and, therefore, a remittitur was not warranted where the damages awarded were not just for the wrongful death of the decedent because the decedent suffered severe pain, suffering and mental anguish for 2 months prior to death as a result of the injuries he sustained in the collision, the decedent had at least 7.3 years of life remaining according to life tables in effect at the time of his death, the plaintiff was the decedent's only child, and the plaintiff and the decedent were extremely close and communicated daily. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

Order of remittitur was proper where trial judge gave consideration to total circumstances, including aggravating effect of subsequent injuries, where facts considered pertinent in reaching that conclusion were that plaintiff had worked approximately 4 years after accident, damage to plaintiff's vehicle was approximately $148, and all medical expenses totaled approximately $8,200. Stratton v. Webb, 513 So. 2d 587, 1987 Miss. LEXIS 2831 (Miss. 1987).

In absence of order for new trial, order of court reducing judgment by approximately $225,000 was a judgment notwithstanding verdict and not remittitur as termed by court where court had found evidence was insufficient as matter of law to support verdict. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

Remittitur of $499,000 in damages was appropriate where, in eminent domain proceeding, it was determined that fast food restaurant was entitled to damages only for actual value of property being taken and not for claimed damage as result of loss of access to frontage road. State Highway Com. v. McDonald's Corp., 509 So. 2d 856, 1987 Miss. LEXIS 2449 (Miss. 1987).

Although, in making the required adjustment of a jury's verdict, the trial judge technically should have granted a motion for a new trial or denied it on condition of plaintiffs accepting a remittitur, the issuance of a judgment notwithstanding the verdict, which achieved the correct result, was harmless error. Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 1987 Miss. LEXIS 2283 (Miss. 1987).

In a personal injury action where the jury awarded $75,000 to the injured party, the trial judge, who failed to find that the jury's verdict was so shocking to the conscience that it evinced bias, passion, and prejudice on the part of the jury, or that the verdict was contrary to the overwhelming weight of the credible evidence, abused his discretion in ordering a new trial conditioned on the plaintiff's acceptance of a remittitur of $35,000. McIntosh

v. Deas, 501 So. 2d 367, 1987 Miss. LEXIS 2240 (Miss. 1987).

The nature of damages in a malicious prosecution action will often be difficult to quantify in monetary terms, and where the verdict returned by the jury in such an action is within the evidence, a remittitur will not be ordered. Royal Oil Co. v. Wells, 500 So. 2d 439, 1986 Miss. LEXIS 2565 (Miss. 1986).

Trial judge abused his discretion in ordering a remittitur of $113,400.38 from a $200,000 jury award to pickup truck operator, who received severe injuries when his vehicle was struck by an oncoming 18-wheel tractor trailer, which jack-knifed and knocked the pickup truck off the highway. Holmes County Bank & Trust Co. v. Staple Cotton Cooperative Asso., 495 So. 2d 447, 1986 Miss. LEXIS 2634 (Miss. 1986).

Jury's verdict awarding $100,000 to a 67 year old, retired man, with a life expectancy of 11.3 years, for injuries sustained while he was held hostage for 35 to 40 minutes in a discount department store by a mentally deranged customer, was excessive, where the total expense of the hostage victim, who was never hospitalized, was only $300.50, and, although he had a one-eighth hearing impairment and some ringing in the ears when the room was quiet, his condition was not rare for a person of his age; since the verdict was clearly against the overwhelming weight of the evidence, the Supreme Court would direct a new trial on damages unless the hostage victim accepted a remittitur of $30,000. Howard Bros. of Phenix City, Inc. v. Penley, 492 So. 2d 965, 1986 Miss. LEXIS 2528 (Miss. 1986).

Trial judge abused his discretion in ordering a remittitur where amount of jury's damage award was supported by the evidence. Anchor Coatings, Inc. v. Marine Industrial Residential Insulation, Inc., 490 So. 2d 1210, 1986 Miss. LEXIS 2492 (Miss. 1986).

Supreme Court would decline to reduce a $400,000 punitive damage award against an insurance company where the record failed to furnish any valid reason for doing so, and where the insurance company had persisted over a period of years in the use in its policies of an uninsured motorist exclusion which was in direct violation of state's public policy. Employers Mut. Casualty Co. v. Tompkins, 490 So. 2d 897, 1986 Miss. LEXIS 2489 (Miss. 1986).

Motion to reduce punitive damages of $1,600,000 assessed by jury is properly denied where amount assessed is less than one percent of financial net worth of defendant. Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 1985 Miss. LEXIS 2229 (Miss. 1985), aff'd, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62, 1988 U.S. LEXIS 2204 (U.S. 1988).

An award of $1,024,268, when reviewed under the standard set forth in § 11-1-55, was not so excessive as to evince bias, prejudice or passion on the part of the jury, or to shock the conscience, in view of the evidence of plaintiff's prior health and in view of the permanent injury in the record. Jesco, Inc. v. Shannon, 451 So. 2d 694, 1984 Miss. LEXIS 1644 (Miss. 1984).

In a personal injury and slander action for damages sustained by plaintiff in an altercation with a guard at an office, the trial court did not abuse its discretion in overruling defendant's motion for a new trial on the issue of damages only and in declining to enter a remittitur, where the evidence was undisputed that plaintiff had sustained injury when he was removed from the building by the guard, and where damages of $5,000 were not excessive. Mississippi Power Co. v. Russell, 377 So. 2d 595, 1979 Miss. LEXIS 2524 (Miss. 1979).

In a personal injury action in which the jury awarded plaintiff damages in the amount of $26,000, the trial court abused its discretion in reducing the amount to $13,700 on defendant's motion for a new trial where plaintiff's loss of wage earning capacity to age 65 amounted to $124,800. Walton v. Scott, 365 So. 2d 630, 1978 Miss. LEXIS 2424 (Miss. 1978).

RESEARCH REFERENCES

ALR.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 16 A.L.R.4th 238.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions. 16 A.L.R.4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems. 16 A.L.R.4th 1127.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 35 A.L.R.4th 441.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 35 A.L.R.4th 538.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker. 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations. 47 A.L.R.4th 134.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest. 48 A.L.R.4th 165.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons. 48 A.L.R.4th 229.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor. 49 A.L.R.4th 1076.

Excessiveness or inadequacy of compensatory damages for defamation. 49 A.L.R.4th 1158.

Damages for breach of contract as affected by income tax considerations. 50 A.L.R.4th 452.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations. 50 A.L.R.4th 787.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 A.L.R.4th 843.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 48 A.L.R.5th 129.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 A.L.R.5th 467.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages. 52 A.L.R.5th 1.

Am. Jur.

7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 13.5 (Notice of Motion–Ground–Remittitur).

CJS.

5 C.J.S., Appeal and Error §§ 1027 et seq.

§ 11-1-56. Responsive pleading to precede assignment to a judge.

Civil actions in circuit, chancery and county court shall not be assigned to a judge until at least one (1) defendant has filed a responsive pleading. However, any necessary preliminary matters may be decided by a judge on a separate rotating basis before assignment of the action to a particular judge.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 4, § 8, eff from and after Jan. 1, 2003.

JUDICIAL DECISIONS

1. Court rules.

By the adoption of Miss. Unif. Ch. Ct. R. 1.06, effective May 29, 2003, the Supreme Court of Mississippi has superseded Miss. Code Ann. § 11-1-56, exercising its inherent authority to adopt rules of practice, procedure and evidence to promote justice, uniformity, and the efficiency of the courts. In re Unif. Ch. Ct. Rules, 2003 Miss. LEXIS 252 (Miss. May 29, 2003).

§ 11-1-57. Additional provisions applicable to all courts.

All things contained in Chapters 7 and 11 of this title, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

HISTORY: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; 1906, § 687; Hemingway's 1917, § 465; 1930, § 474; 1942, § 1412.

Cross References — Rules of evidence generally, see §§ 13-1-1 et seq.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Venue.
3. Process and return.
4. Nonsuit or dismissal.
5. Evidence.

1. In general.

By this section the provisions of the chapter are made applicable to all courts, and this embraces the county court; and, accordingly, conviction on a plea of guilty entered on an amendable affidavit is good and cannot be set aside on certiorari because of a defective affidavit. Bogle v. State, 155 Miss. 612, 125 So. 99, 1929 Miss. LEXIS 347 (Miss. 1929).

2. Venue.

In view of this section a fraternal benefit association may be sued in the chancery court of the county in which the beneficiary resides. Masonic Ben. Ass'n v. Dotson, 111 Miss. 60, 71 So. 266, 1916 Miss. LEXIS 240 (Miss. 1916).

3. Process and return.

In view of the section and Code 1930, §§ 575, 1397 case held triable at return term of circuit court, where summons was served July 21 and made returnable August 20, as against contention that both day of service and day of return had to be excluded. Mississippi C. R. Co. v. Aultman, 173 Miss. 622, 160 So. 737, 1935 Miss. LEXIS 205 (Miss. 1935).

4. Nonsuit or dismissal.

Where a suit was brought in chancery court for cancelation of a conveyance on the ground that it has never been delivered, the chancellor should have granted the complainant's motion for voluntary dismissal without prejudice where there was no submission to the chancellor for final decision on merits. Graham v. Graham, 214 Miss. 99, 58 So. 2d 85, 1952 Miss. LEXIS 449 (Miss. 1952).

A complainant in the chancery court has the right under the statute to dismiss his suit without prejudice. This rule applies in all cases where the defendant will not be prejudiced by a dismissal. Adams v. Lucedale Commercial Co., 113 Miss. 608, 74 So. 435, 1917 Miss. LEXIS 137 (Miss. 1917); Adams v. Dean, 74 So. 436 (Miss. 1917); Adams v. Leatherbury, 74 So. 436 (Miss. 1917); Adams v. McInnis, 74 So. 436 (Miss. 1917).

5. Evidence.

Under the provisions of this section Code 1942, § 1469 is applicable to suits in the chancery court. General Acceptance Corp. v. Holbrook, 254 Miss. 78, 179 So. 2d 845, 1965 Miss. LEXIS 927 (Miss. 1965).

In action of unlawful entry and detainer, introduction in evidence of deed to plaintiff held not objectionable on ground that no copy of deed was filed as exhibit to declaration, since statute (Code 1930, § 3458) made no such requirement. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Statutes requiring copy of writing to be annexed to declaration or bill before evidence of writing may be introduced applies to chancery court as well as to circuit court. Thomas v. B. Rosenberg & Sons, Inc., 153 Miss. 314, 120 So. 732, 1929 Miss. LEXIS 18 (Miss. 1929).

RESEARCH REFERENCES

Am. Jur.
20 Am. Jur. 2d (Rev), Courts §§ 27- 39, 42- 52.

CJS.
21 C.J.S., Courts §§ 241-257.

§ 11-1-58. Certificate of consultation required in medical malpractice actions; exceptions.

(1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

(2) Where a certificate is required pursuant to this section only, a single certificate is required for an action, even if more than one (1) defendant has been named in the complaint or is subsequently named.

(3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of "res ipsa loquitur" or "informed consent." In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

(4) If a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been

produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

(5) For purposes of this section, an attorney who submits a certificate of consultation shall not be required to disclose the identity of the consulted or the contents of the consultation; provided, however, that when the attorney makes a claim under paragraph (c) of subsection (1) of this section that he was unable to obtain the required consultation with an expert, the court, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of this section, may require the attorney to divulge to the court, in camera and without any disclosure by the court to any other party, the names of physicians refusing such consultation.

(6) The provisions of this section shall not apply to a plaintiff who is not represented by an attorney.

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or nontrial expert, except as expressly stated herein.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 2, § 6, eff from and after Jan. 1, 2003.

JUDICIAL DECISIONS

ANALYSIS

1. Dismissal for non-compliance proper.
2. Dismissal for non-compliance improper.
3. Applicability.
4. Illustrative cases.

1. Dismissal for non-compliance proper.

Although the state legislature could not promulgate statutes dictating to the judiciary what a party was required to attach to pleadings filed in court, the legislature had constitutional authority to set out pre-suit requirements such as the requirement that a litigant obtain an expert consultation prior to commencing a medical malpractice suit. Where the attorney representing the personal representative of the estate of a decedent in a wrongful death suit against a nursing care facility admitted that he did not consult an expert prior to commencing the lawsuit, the nursing care facility was entitled to a dismissal. Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister, 992 So. 2d 1179, 2008 Miss. LEXIS 521 (Miss. 2008).

Trial court improperly denied defendant hospital and administrator's motion to dismiss the daughter's negligence action due to the daughter's failure to strictly comply with Miss. Code Ann. § 11-1-58; since the daughter obtained the mother's authorization for medical records after filing suit, she could not act on her mother's behalf. Cmty. Hosp. v. Goodlett, 968 So. 2d 391, 2007 Miss. LEXIS 528 (Miss. 2007), overruled in part, Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense plaintiffs' failure to comply with the statute. Caldwell v. N. Miss. Med. Ctr., Inc., 956 So. 2d 888, 2007 Miss. LEXIS 280 (Miss. 2007), overruled in part, Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

Trial court properly dismissed a wrongful death and negligence action filed by the administratrix of the decedent's estate against a nursing home as the administratrix failed to comply with Miss. Code Ann. § 11-1-58 by failing to timely inform the nursing home that an expert had been consulted by way of an attorney's certificate of compliance. Walker v. Whitfield Nursing Ctr., Inc., 931 So. 2d 583, 2006 Miss. LEXIS 301 (Miss. 2006), overruled in part, Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

2. Dismissal for non-compliance improper.

In a medical negligence action, a doctor and a medical center waived the defense of a lack of strict compliance with Miss. Code Ann. § 11-1-58 because, although both asserted the defense in their answers, they failed to further assert or pursue the defense until they filed their joint motion to dismiss nearly three years after the action was filed. Meadows v. Blake, 36 So. 3d 1225, 2010 Miss. LEXIS 296 (Miss. 2010).

Mississippi Supreme Court is unable to ignore the constitutional imperative that the Mississippi Legislature refrain from promulgating procedural statutes which require dismissal of a complaint, and, particularly, a complaint filed in full compliance with the Mississippi Rules of Civil Procedure; the requirement in Miss. Code Ann. § 11-1-58(1)(a) that a complaint be accompanied by a certificate or waiver is such a procedural statute. Thomas v. Warden, 999 So. 2d 842, 2008 Miss. LEXIS 600 (Miss. 2008).

Trial court erred in dismissing plaintiffs' medical negligence action against a physician and a hospital for failure to file with the complaint a certificate of compliance as required by Miss. Code Ann. § 11-1-58(1)(a) because the complaint did not need to be dismissed simply because plaintiffs failed to attach a certificate or waiver. Thomas v. Warden, 999 So. 2d 842, 2008 Miss. LEXIS 600 (Miss. 2008).

Medical malpractice plaintiff's failure to attach a certificate of consultation to her complaint as required by Mississippi Code Annotated section 11-1-58(1)(a) did not mandate dismissal of the cause of action because, under the separation of powers doctrine, only the statute supreme court had the authority to establish procedural rules; as such, the statute was an unconstitutional procedural statute. A medical malpractice complaint, otherwise properly filed in accordance with the Mississippi Rules of Civil Procedure, could not be dismissed and need not be amended simply because a plaintiff failed to attach a certificate of consultation. Ellis v. Miss. Baptist Med. Ctr., Inc., 997 So. 2d 996, 2008 Miss. App. LEXIS 780 (Miss. Ct. App. 2008).

Relative, who served her certificate of review in January 2006 before she filed suit in April 2006, satisfied the pre-suit requirements of Miss. Code Ann. § 11-1-58; in accordance with the intervening change in the law, the trial court should not have dismissed the relative's wrongful death complaint against the doctors and medical center. McClain v. Clark, 992 So. 2d 636, 2008 Miss. LEXIS 515 (Miss. 2008).

3. Applicability.

Complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiff failed to attach a certificate or waiver; the certificate did not indicate whether the daughter's attorney consulted with the expert prior to, or after, filing the complaint; if the former, then the daughter was in compliance with the enforceable portion of § 11-1-58, and if the latter, then the pretrial statutory requirement was not met, and the trial court had to dismiss the complaint with prejudice. Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

Where an employee killed co-workers after being referred to counseling by the employer and an employee assistance provider (EAP), the EAP was not entitled to summary judgment as to negligence claims because pre-suit notice and an expert certification were not required since the claims were for ordinary negligence, not medical malpractice. Tanks v. NEAS, Inc., 519 F. Supp. 2d 645, 2007 U.S. Dist. LEXIS 70334 (S.D. Miss. 2007).

4. Illustrative cases.

Where the patient filed a medical malpractice suit, contending that employees of the medical center were negligent in their examination, assessment, and care of her, proximately causing her stroke, she failed to attach a certificate of compliance to her complaint in accord with Miss. Code Ann. § 11-1-58. The patient was permitted to amend her complaint. Moore v. Delta Reg'l Med. Ctr., 23 So. 3d 541, 2009 Miss. App. LEXIS 328 (Miss. Ct. App. 2009).

RESEARCH REFERENCES

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

§ 11-1-59. Damages in medical malpractice actions.

In any action at law against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to recover damages based upon a professional negligence theory, the complaint or counterclaim shall not specify the amount of damages claimed, but shall only state that the damages claimed are within the jurisdictional limits of the court to which the pleadings are addressed and whether or not the amount of such damages is ten thousand dollars ($10,000.00) or more, or such other minimum amount as shall be necessary to invoke federal jurisdiction if the action is brought in federal court.

HISTORY: Laws, 1983, ch. 425, eff from and after July 1, 1983.

JUDICIAL DECISIONS

1. Pleadings.

In a patient's medical malpractice suit, defendants' notice of removal was timely because (1) the patient was prohibited from including an ad damnum clause in the complaint and the facts alleged did not unequivocally establish that the plaintiff was seeking more than $ 75,000, and (2) the patient's responses constituted an "other paper" because the patient's evasive response to defendants' requests for admission, combined with the patient's manifestation of intent to seek over $ 75,000, was tantamount to a denial of defendants' requests for admission. Harden v. Field Mem. Cmty. Hosp., 516 F. Supp. 2d 600, 2007 U.S. Dist. LEXIS 28436 (S.D. Miss. 2007), aff'd, 265 Fed. Appx. 405, 2008 U.S. App. LEXIS 3524 (5th Cir. Miss. 2008).

RESEARCH REFERENCES

ALR.

Arbitration of medical malpractice claims. 84 A.L.R.3d 375.

Medical malpractice: "loss of chance" causality. 54 A.L.R.4th 10.

Liability of osteopath for medical malpractice. 73 A.L.R.4th 24.

"Dual Capacity Doctrine" as basis for employee's recovery for medical malpractice from company medical personnel. 73 A.L.R.4th 115.

Liability for medical malpractice in connection with performance of circumcision. 75 A.L.R.4th 710.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during cesarean delivery. 76 A.L.R.4th 1112.

Liability for dental malpractice in provision or fitting of dentures. 77 A.L.R.4th 222.

Liability of chiropractors and other drugless practitioners for medical malpractice. 77 A.L.R.4th 273.

Malpractice involving hysterectomies and oophorectomies. 86 A.L.R.4th 18.

Gynecological malpractice not involving hysterectomies or oophorectomies. 86 A.L.R.4th 125.

Opthalmological malpractice. 30 A.L.R.5th 571.

Medical Malpractice: negligent catheterization. 31 A.L.R.5th 1.

Medical malpractice liability of sports medicine care providers for injury to, or death of athlete. 33 A.L.R.5th 619.

Malpractice: Physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient. 47 A.L.R.5th 433.

Malpractice in diagnosis and treatment of male urinary tract and related organs. 48 A.L.R.5th 575.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

Malpractice in diagnosis or treatment of meningitis. 51 A.L.R.5th 301.

Am. Jur.

13A Am. Jur. Pl & Pr Forms (Rev), Hospitals and Asylums, Form 45.1 (Complaint, petition, or declaration – Negligence in care of newborn – Loss of society).

13A Am. Jur. Pl & Pr Forms (Rev), Hospitals and Asylums, Form 68.1 (Complaint, petition, or declaration – Allegation – Malpractice).

13A Am. Jur. Pl & Pr Forms (Rev), Hospitals and Asylums, Form 68.2 (Complaint, petition, or declaration – Negligence in care of newborn – Res ipsa loquitur).

18A Am. Jur. Pl & Pr Forms (Rev), Negligence, Form 370 (Complaint, petition, or declaration – Against hospital and physician – Injury to newborn – Loss of society).

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 122.1 (Complaint, petition, or declaration – For malpractice – General form – Allegations).

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 122.2 (Complaint, petition, or declaration – For malpractice allegation – Loss of consortium).

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 124.1 (Complaint, petition, or declaration – For malpractice allegation – Vicarious liability).

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 278.3 (Complaint, petition, or declaration – Podiatric malpractice).

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 293.1 (Complaint, petition, or declaration – Metallic wire left in during surgery – Against physicians and surgeons).

19 Am. Jur. Proof of Facts 2d 285, Physician's Failure to Perform Timely Cesarean Section.

20 Am. Jur. Proof of Facts 2d 421, Therapist's Liability for Injury caused by Nonverbal Therapy.

22 Am. Jur. Proof of Facts 2d 1, Medical Malpractice – Use of Hospital Records.

22 Am. Jur. Proof of Facts 2d 721, Plastic Surgeon's Liability in Cosmetic Surgery Cases.

23 Am. Jur. Proof of Facts 2d 293, Negligence in Use of Diet and Weight Control Drugs in Treatment of Obesity.

25 Am. Jur. Proof of Facts 2d 411, Nurse's Failure to Give Physician Timely Notice of Patient's Condition.

25 Am. Jur. Proof of Facts 2d 657, Negligent Diagnosis of Eye Disease.

26 Am. Jur. Proof of Facts 2d 183, Medical Malpractice – Negligence in Postoperative Care of Patient.

26 Am. Jur. Proof of Facts 2d 363, Malpractice of Psychiatric Nurse.

30 Am. Jur. Proof of Facts 2d 95, Brain Injuries Due to Trauma.

34 Am. Jur. Proof of Facts 2d 199, Druggist's Liability for Improperly Filling Prescription.

36 Am. Jur. Proof of Facts 2d 637, Medical Malpractice: Liability for Negligent Injection or Infusion.

38 Am. Jur. Proof of Facts 2d 445, Vicarious Liability of Physician for Negligence of Another.

38 Am. Jur. Proof of Facts 2d 589, Physician's Liability for Causing Patient's Drug Addiction.

39 Am. Jur. Proof of Facts 2d 545, Complications Due to Immobilization.

42 Am. Jur. Proof of Facts 2d 405, Physician's Failure to Disclose Diagnosis or Test Result.

43 Am. Jur. Proof of Facts 2d 109, Hospital – Acquired Infections.

43 Am. Jur. Proof of Facts 2d 657, Physician's Failure to Protect Third Party from Harm by Nonpsychiatric Patient.

44 Am. Jur. Proof of Facts 2d 55, Kidney Injuries.

44 Am. Jur. Proof of Facts 2d 499, Medical Malpractice: Electroconvulsive Therapy.

47 Am. Jur. Proof of Facts 2d 1, Malpractice by Emergency Department Physician.

47 Am. Jur. Proof of Facts 2d 525, Medicolegal Malpractice: Wrongful Claim Review by Physician.

1 Am. Jur. Proof of Facts 3d 691, Failure to Diagnose Impending Heart Attack.

4 Am. Jur. Proof of Facts 3d 689, Ophthalmic Malpractice.

8 Am. Jur. Proof of Facts 3d 145, Use of CAT Scans in Litigation.

16 Am. Jur. Proof of Facts 3d 49, Negligence of Optometrist.

23 Am. Jur. Proof of Facts 3d 1, Optician's Negligence: Proof that an Optician Negligently Dispensed an Optical Device.

25 Am. Jur. Trials 185, Recovery Room Accidents.

30 Am. Jur. Trials 237, Misdiagnosis of Cancer and Loss of Chance.

30 Am. Jur. Trials 437, Countering the Standard Defenses in a Breast Cancer Malpractice Case.

32 Am. Jur. Trials 179, Eye Surgery Malpractice – Cataracts.

32 Am. Jur. Trials 375, Pharmacist Liability.

32 Am. Jur. Trials 547, Medicolegal Malpractice Litigation.

32 Am. Jur. Trials 673, Defective Prosthesis Litigation – Silicone Breast Implant.

35 Am. Jur. Trials 637, Trial Report: Informed Consent to Brain Surgery.

40 Am. Jur. Trials 1, Obstetrical Malpractice.

51 Am. Jur. Trials 375, Trial Report: Negligent Pediatric Care.

52 Am. Jur. Trials 347, Medical Malpractice: Brain – Damaged Infant.

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

§ 11-1-60. Limitation on noneconomic damages in medical malpractice actions; definitions.

(1) For the purposes of this section, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.

(b) "Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

(2)(a) In any cause of action filed on or after September 1, 2004, for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than Five Hundred Thousand Dollars ($500,000.00) for noneconomic damages.

(b) In any civil action filed on or after September 1, 2004, other than those actions described in paragraph (a) of this subsection, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages.

It is the intent of this section to limit all noneconomic damages to the above.

(c) The trier of fact shall not be advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation.

(3) Nothing contained in subsection (1) of this section shall be construed as creating a cause of action or as setting forth elements of or types of damages that are or are not recoverable in any type of cause of action.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 2, § 7; Laws, 2004, 1st Ex. Sess., ch. 1, § 2, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. Applicaton.
3. “Plaintiffs.”
4. Erroneous directed verdict.

1. Constitutionality.

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court’s application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution’s Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249, 2013 U.S. App. LEXIS 4035 (5th Cir. Miss. 2013).

Court’s reduction of noneconomic damages awarded by a jury was affirmed because Miss. Code Ann. § 11-1-60(2)(b) was not shown to be in palpable conflict with the right to have a jury alone find the amount of compensatory damages. The common law jury guarantee was not shown to includes the right to a judgment equal to the jury’s damages finding. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249, 2013 U.S. App. LEXIS 4035 (5th Cir. Miss. 2013).

High court declined to answer a certified question regarding the constitutionality of Miss. Code Ann § 11-1-60(2), which generally limited non-economic damages to $ 1 million, because it would require speculation and guesswork to determine what portion of the jury’s $ 4 million general verdict represented noneconomic damages. Sears v. Learmonth, 95 So. 3d 633, 2012 Miss. LEXIS 422 (Miss. 2012).

2. Applicaton.

Trial court properly applied this section and Miss. Code Ann. § 85-5-7(2) to the damages award, finding that the sandblasting company was liable for the damages apportioned to it, which were below the $1 million cap. Miss. Valley Silica Co. v. Barnett, 227 So. 3d 1102, 2016 Miss. App. LEXIS 548 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 401 (Miss. 2017).

3. "Plaintiffs."

Miss. Code Ann. § 11-1-60(2)(a) instituted a cap on noneconomic damages recoverable by "the plaintiff," and under Miss. Code Ann. § 1-3-33, words written in the singular were to be read in the plural; therefore, a cap on noneconomic damages applied to all plaintiffs who brought a wrongful-death action pursuant to Miss. Code Ann. § 11-7-13. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555, 2007 Miss. LEXIS 649 (Miss. 2007).

4. Erroneous directed verdict.

Record provided evidence from which a reasonable juror could find noneconomic damages; the testimony of two expert witnesses and the employee created a question of fact for the jury with respect to pain, suffering, inconvenience, physical impairment, disfigurement, and loss of the enjoyment of life. From the evidence found in the record, as well as all reasonable inferences which could be drawn from the evidence, viewed in the light most favorable to the employee, it could not be safely said that reasonable and fair-minded jurors in the exercise of impartial judgment could have found only for the employer on the issue of noneconomic damages. Kennedy v. Ill. Cent. R.R. Co., 2010 Miss. LEXIS 14 (Miss. Jan. 7, 2010), op. withdrawn, sub. op., 30 So. 3d 333, 2010 Miss. LEXIS 130 (Miss. 2010).

Trial court erred in directing a verdict in favor of an employer in an action under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 (2009), because reasonable and fair-minded jurors in the exercise of impartial judgment could have found for the employee on the issue of economic damages, as defined under Miss. Code Ann. § 11-1-60(1)(a). Kennedy v. Ill. Cent. R.R. Co., 30 So. 3d 333, 2010 Miss. LEXIS 130 (Miss. 2010).

RESEARCH REFERENCES

ALR.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription – Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072). 109 A.L.R.5th 397.

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

§ 11-1-61. Expert witness in action against physician.

In any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state, or some other state, as a doctor of medicine.

HISTORY: Laws, 1990, ch. 440, § 1, eff from and after passage (approved March 21, 1990).

JUDICIAL DECISIONS

ANALYSIS

1. Conflicts with Rules of Evidence.
2. Illustrative cases.

1. Conflicts with Rules of Evidence.

Miss. Code Ann. § 11-1-61 does not conflict with the Mississippi Rules of Evidence, which govern evidentiary matters, including the qualification of expert witnesses, Miss. R. Evid. 702. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

2. Illustrative cases.

Finding in favor of the patient in his medical malpractice action was improper where the trial court erred in allowing the testimony of an orthopedic surgeon because that doctor was not qualified to testify as to the standard of care in August of 1995 since he was still in his residency in Austria and had not completed his own orthopedic training at that time. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

RESEARCH REFERENCES

ALR.

Propriety of cross-examining expert witness regarding his status as "professional witness". 39 A.L.R.4th 742.

Compelling testimony of opponent's expert in state court. 66 A.L.R.4th 213.

Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. 18 A.L.R.6th 325.

Law Reviews.

McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

§ 11-1-62. Protection of medical professionals who prescribe FDA approved drugs.

In any civil action alleging damages caused by a prescription drug that has been approved by the federal Food and Drug Administration, a physician, optometrist, nurse practitioner or physician assistant may not be sued unless the plaintiff pleads specific facts which, if proven, amount to negligence on the part of the medical provider. It is the intent of this section to immunize innocent medical providers listed in this section who are not actively negligent from forum-driven lawsuits.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 2, § 3, eff from and after January 1, 2003.

RESEARCH REFERENCES

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

§ 11-1-63. Product liability actions; conditions for liability; what constitutes a defective product.

Subject to the provisions of Section 11-1-64, in any action for damages caused by a product, including, but not limited to, any action based on a theory of strict liability in tort, negligence or breach of implied warranty, except for commercial damage to the product itself:

(a) The manufacturer, designer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:

(i)1. The product was defective because it deviated in a material way from the manufacturer's or designer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer, designer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller, the manufacturer, designer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer, designer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

(e) In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer, designer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer, designer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to paragraph (a) shall indemnify a product seller or designer for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller or designer exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller or designer had actual knowledge of the defective condition of the product at the time he supplied same; or the seller or designer made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller or designer has given prompt notice of the suit to the manufacturer within ninety (90) days of the service of the complaint against the seller.

(h) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the seller or designer of a product other than the manufacturer shall not be liable unless the seller or designer exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller or designer had actual or constructive knowledge of the defective condition of the product at the time he supplied the product. It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.

(i) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

HISTORY: Laws, 1993, ch. 302, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 5; Laws, 2004, 1st Ex. Sess., ch. 1, § 3; Laws, 2014, ch. 383, § 1, eff from and after July 1, 2014.

Editor's Notes — Laws of 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

Section 11-1-64, referred to in the first line of the section, was repealed by Laws of 2004, 1st Ex. Sess., ch. 1, § 7, effective September 1, 2004.

Laws of 2014, ch. 383, § 2 provides:

"SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."

Cross References — Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.
3. Expert testimony.
4. Tobacco products.
5. Substantial change.
6. Adequate warnings.
7. Design defect.
8. — Open and obvious danger.
9. Feasible design alternative.
10. Prima facie case.
11. Evidence.
12. Jury instruction.
13. Asbestos cases.
14. Reliance.
15. Preservation for review.
16. Proximate cause.
17. Innocent seller.

1. In general.

In general, a claimant must make out a prima facie products liability case in Mississippi by showing that: (1) a product is defective; (2) that the defect causes the product to be unreasonably dangerous; (3) that the unreasonably dangerous defect causes the harm complained of; and (4) that the defective condition exists at the time the product leaves the control of the manufacturer or seller. Miss. Code Ann. Section 11-1-63(a) serves as a claimant's roadmap and provides the basic framework from which claimants classify their particular claims. Williams v. Bennett, 921 So. 2d 1269, 2006 Miss. LEXIS 46 (Miss. 2006).

"Defective condition," required under Miss. Code Ann. § 11-1-63(a)(ii), (iii), should be distinguished under the statute from a "defective product," which would be required under the first part of the statutory claim, § 11-1-63(a)(i), if the plaintiff sues under § 11-1-63(a)(i)(1), (2), or (3); the "defective condition" considered by § 11-1-63(a)(ii) and (iii) is merely the satisfaction of one of four possible elements under § 11-1-63(a)(i). Forbes v. GMC, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Summary judgment granted in favor of a manufacturer was affirmed; the individual did not prove causation as required by Miss. Code Ann. § 11-1-63(a)(iii) as he failed to establish that someone had followed the manufacturer's instructions in removing a bearing, but that the instructions were inadequate which caused the axle on his truck to snap and cause his injuries. Harris v. Int'l Truck & Engine Corp., 912 So. 2d 1101, 2005 Miss. App. LEXIS 751 (Miss. Ct. App. 2005).

Recusal was not merited under 28 U.S.C.S. § 455 where district court's refusal to transfer asbestos litigation to a multi-district litigation court was not motivated by the court's alleged bias against defendants in asbestos removal litigation and the merits did not favor removal as plaintiffs' claims under Miss. Code Ann. § 11-1-63 clearly permitted retailers to be sued in products liability cases even absent a showing of fault, thus making defendants' burden of demonstrating no possibility of recovery extremely difficult. Duffin v. Honeywell Int'l, Inc., 2004 U.S. Dist. LEXIS 12856 (N.D. Miss. Apr. 26, 2004).

Plaintiff's product's liability suit against a paintball gun manufacturer was properly dismissed on summary judgment, as plaintiff (1) did not prove that the paintball gun that allegedly injured him failed to function as expected; (2) offered no feasible design alternative that would have prevented the alleged injury; (2) knew that protective eyewear was available but chose not to buy any; and (3) was an active participant in shooting paintballs at other vehicles when he allegedly was injured. Clark v. Brass Eagle, Inc., 866 So. 2d 456, 2004 Miss. LEXIS 219 (Miss. 2004).

Plain meaning of the language of the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, is that the statute imposes liability on the manufacturer or seller for warnings that were inadequate at the time of sale, not for warnings that became inadequate at some later time. Therefore, it appears that there is no post-sale duty to warn under the statute. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In an automobile owners' products liability action concerning an automobile fire that occurred in 1998, because the automobile manufacturer's engineer testified that in 1990 the manufacturer knew that leaves could collect in the blower box and cause smoke after contacting a resistor, it was not unreasonable for the jury to find that the leaves could also cause a fire, thereby establishing the owners' claim for design defect. Hughes v. Ford Motor Co., 204 F. Supp. 2d 958, 2002 U.S. Dist. LEXIS 17092 (N.D. Miss. 2002).

The Mississippi Products Liability Act does not abrogate a statutory cause of action for breach of implied warranty as ground for recovery. Bennett v. Madakasira, 821 So. 2d 794, 2002 Miss. LEXIS 107 (Miss. 2002).

The statute is not an abandonment of strict products liability; although common law strict liability is no longer the authority on the necessary elements of a products liability action, the concept of strict liability is still quite alive within the statute. Huff v. Shopsmith, Inc., 786 So. 2d 383, 2001 Miss. LEXIS 144 (Miss. 2001).

The statute was not intended to abrogate the long established common law theory of negligence or the statutory cause of action for breach of implied warranty.

Childs v. GMC, 73 F. Supp. 2d 669, 1999 U.S. Dist. LEXIS 15757 (N.D. Miss. 1999).

This section was not intended to abrogate the long established common law theory of negligence or the statutory cause of action for breach of implied warranty. Childs v. GMC, 73 F. Supp. 2d 669, 1999 U.S. Dist. LEXIS 15757 (N.D. Miss. 1999).

A feasible design alternative to an allegedly defective design is a prerequisite under this section. Hammond v. Coleman Co., 61 F. Supp. 2d 533, 1999 U.S. Dist. LEXIS 13701 (S.D. Miss. 1999), aff'd, 209 F.3d 718, 2000 U.S. App. LEXIS 4553 (5th Cir. Miss. 2000).

The risk-utility analysis applies to design defects cases, not manufacturing defect cases. Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380, 1999 U.S. App. LEXIS 18463 (5th Cir. Miss. 1999), abrogated, Samantar v. Yousuf, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047, 2010 U.S. LEXIS 4378 (U.S. 2010).

Hangar doors were "fixtures," rather than "products," and, therefore, this section did not apply to an action arising from an incident in which the plaintiff was killed when one of a set of swinging hangar doors closed on him, crushing him between the door and door jamb. Bragg v. United States, 55 F. Supp. 2d 575, 1999 U.S. Dist. LEXIS 11240 (S.D. Miss. 1999).

Damages caused by the product that adversely affect the product's monetary value are not within the scope of this section's coverage, and thus, the product owner would have to seek a remedy in the law of warranty or contract. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 736 So. 2d 384, 1999 Miss. App. LEXIS 106 (Miss. Ct. App. 1999).

When a plaintiff is relying on subsection (a)(i)(2) of this section in a products liability action, the known or open and obvious danger defense is a factor to be considered by the jury in determining whether a product is unreasonably dangerous. Hageney v. Jackson Furniture, Inc., 746 So. 2d 912, 1999 Miss. App. LEXIS 98 (Miss. Ct. App. 1999).

Conveyor manufacturer's concession in products liability case that it did not contest feasibility of alternative designs proposed by plaintiff's expert, but that defendant did claim that subsequent designs did not serve identified functions that its conveyor served, did not relieve plaintiff of requirement under *Daubert* that she independently establish technical basis for utility and safety of proposed alternative designs; manufacturer did not stipulate that alternative designs did not impair "utility, usefulness, practicability or desirability of the product to users or consumers," within meaning of Mississippi law. Watkins v. Telsmith, Inc., 121 F.3d 984, 1997 U.S. App. LEXIS 24925 (5th Cir. Miss. 1997).

A trial court in a strict products liability action did not err in applying a "risk-utility" analysis, under which a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product, instead of a "consumer expectations" analysis, under which the product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it; a risk-utility analysis best protects both the manufacturer and the consumer as it does not create a duty on the manufacturer to create a completely safe product, but instead charges the manufacturer with the duty to make its product reasonably safe regardless of whether the consumer is aware of the product's dangerousness, and the consumer can recover for any injury resulting from a product danger even if he or she appreciates that danger so long as the utility of the product is outweighed by the danger that the product creates. Sperry-New Holland, Div. of Sperry Corp. v. Prestage, 617 So. 2d 248, 1993 Miss. LEXIS 124 (Miss. 1993).

Under the "risk-utility" test for determining whether a product is "unreasonably dangerous" within the meaning of § 402A of the Restatement of Torts, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product. Sperry-New Holland, Div. of Sperry Corp. v. Prestage, 617 So. 2d 248, 1993 Miss. LEXIS 124 (Miss. 1993).

2. Applicability.

Common law, rather than the Mississippi Products Liability Act (MPLA), applied to an injured driver's negligence/failure-to-warn claims against a lessor of farm equipment, after the driver had his left arm severed by a farm disc that was being towed by a pick-up heading the opposite direction, because 2014 amendments suggested that the legislature did not intend to expand the MPLA beyond the three specific categories identified - manufacturers, designers, and sellers. Funches v. Progressive Tractor & Implement Co., L.L.C., 905 F.3d 846, 2018 U.S. App. LEXIS 27725 (5th Cir. Miss. 2018).

When homeowners sued a drywall seller for selling defective drywall, while, when suit was filed, the Mississippi Products Liability Act (MPLA) did not completely abrogate the homeowners' breach of implied warranty claim, the seller was still entitled to summary judgment because the MPLA, including an innocent seller provision, applied broadly to any suit for damage caused by a defective product, except commercial damage. Holifield v. City Salvage, Inc., 230 So. 3d 736, 2017 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 483 (Miss. 2017).

Homeowners' common-law negligence and strict liability claims against a pipeline owner, an odorant manufacturer, and an odorant distributor failed as a matter of law because the Mississippi Products Liability Act provided the framework for analyzing the claims based on odorant fade. Elliott v. El Paso Corp., 181 So. 3d 263, 2015 Miss. LEXIS 457 (Miss. 2015).

Legislature intended to exempt every person participating in the procurement, processing, storage, distribution, and/or use of whole blood, plasma, blood products and blood derivatives, human tissue, organs or bones for the purpose of injecting, transfusing, transplanting or transferring the same or any of them into the human body from liability under the theory of strict products liability; the Mississippi Products Liability Act does not intend to change that long-standing concept. Palermo v. Lifelink Found., Inc., 152 So. 3d 1099, 2014 Miss. LEXIS 578 (Miss. 2014).

Trial court did not err by granting a manufacturer's motion for summary judgment on a patient's claim under the Mississippi Products Liability Act (MPLA) because the manufacturer was statutorily defined as a service provider; the plain language of the MPLA makes clear that it does not apply to mere service providers. Palermo v. Lifelink Found., Inc., 152 So. 3d 1099, 2014 Miss. LEXIS 578 (Miss. 2014).

Plaintiff, who took a generic equivalent of a brand-name drug, could not pursue a misrepresentation claim against manufacturers of the brand-name drug under a theory of innovator liability; Mississippi products liability law shielded the manufacturers from liability for products they did not create. Chatman v. Pfizer, Inc., — F. Supp. 3d —, 2014 U.S. Dist. LEXIS 127323 (S.D. Miss. Sept. 11, 2014).

Patient was barred from bringing a strict-products-liability claim or products-liability claim against a non-profit tissue bank, which supplied an allograft for the patient's surgery, because human tissue, pursuant to Miss. Code Ann. § 41-41-1, was not a product under the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63. Palermo v. LifeLink Found., Inc., 152 So. 3d 1177, 2014 Miss. App. LEXIS 14 (Miss. Ct. App.), aff'd, 152 So. 3d 1099, 2014 Miss. LEXIS 578 (Miss. 2014).

While negligence claims can be brought alongside strict liability claims, the findings for the claims brought under the Mississippi Products Liability Act can be dispositive as to the product-based negligence claims such as negligent failure to warn and negligent design. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

Court rejected van manufacturer's and seller's contention that a driver's exclusive remedy was to bring an action under the Mississippi Products Liability Act (MPLA), Miss. Code Ann. § 11-1-63 et seq., finding no statutory requirement that made the MPLA the exclusive remedy for claims of malfunctioning automobiles. Additionally, breach of implied warranty claims were not barred by the MPLA. Watson Quality Ford, Inc. v. Casanova, 999 So. 2d 830, 2008 Miss. LEXIS 593 (Miss. 2008).

In a product liability case, a district court rejected the argument of a car maker and an occupant restraint maker that the first sentence in Miss. Code Ann. § 11-1-63 stands for the proposition that the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, is the only statutory vehicle through which one can pursue a product liability claim, thereby excluding a negligence theory. Williams v. Daimler Chrysler Corp., 2008 U.S. Dist. LEXIS 55123 (N.D. Miss. July 18, 2008), aff'd, 310 Fed. Appx. 747, 2009 U.S. App. LEXIS 5870 (5th Cir. Miss. 2009).

Mississippi courts are unified in their interpretation of the legislative mandate set forth in Miss. Code Ann. § 11-1-63, the Mississippi products liability statute. Moreover, in explicit terms, the statute requires that when a claimant asserts a design defect theory of liability, the claimant not only must provide proof that the seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger causing injury, but also, the claimant must provide evidence that the product failed to function as expected by way of producing evidence of a feasible design alternative that could have reasonably prevented the claimant's injury; in the case at bar, where a handgun fell from plaintiff's car door and discharged (in part, it was undisputed that the safety was off), he failed to prove the aforementioned elements and summary judgment for defendant was proper. Williams v. Bennett, 921 So. 2d 1269, 2006 Miss. LEXIS 46 (Miss. 2006).

In a case involving a dispute over an allegedly defective roof, summary judgment was properly granted in favor of several builders because the action was untimely; Miss. Code Ann. § 11-1-63 and Miss. Code Ann. § 15-1-49 did not apply because an improvement to real property was not a product. Ferrell v. River City Roofing, Inc., 912 So. 2d 448, 2005 Miss. LEXIS 517 (Miss. 2005).

In a mass-joined asbestos action in which numerous consumers sought recovery against numerous defendants for injuries resulting from exposure to asbestos-containing products, where the consumers' complaint alleged that certain local retailers should be held liable under Mississippi law because they sold unreasonably dangerous and defective products, the complaint stated a cause of action against the retailers because Miss. Code Ann. § 11-1-63 clearly provided for strict liability against retailers in products liability cases. Duffin v. Honeywell Int'l, Inc., 312 F. Supp. 2d 869, 2004 U.S. Dist. LEXIS 12857 (N.D. Miss. 2004).

Grant of summary judgment in favor of the company in a wrongful death action was proper where products liability law limited itself to imposing liability on entities engaged in the actual production or sale of goods, Miss. Code Ann. § 11-1-63(a); further, the beneficiaries abandoned their motion for leave to amend because they permitted over three and on-half months to pass without making any effort to pursue a ruling on the motion in face of knowledge that the trial court had taken the summary judgment motion filed against them under advisement, Miss. Unif. Cir. & County Ct. Prac. R. 4.03(1), 2.04. Harrison v. B.F. Goodrich Co., 881 So. 2d 288, 2004 Miss. App. LEXIS 173 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1111 (Miss. 2004).

Trial court could not exclude material as to a warning in an owner's manual as irrelevant based upon the plaintiffs' admission that they did not rely upon any information in their owner's manual. Because reliance on the manufacturer's warning was not an element of an inadequate warnings case. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Where a truck driver died in a single-vehicle log truck accident, and his wrongful death beneficiaries lost their suit, controlling law applied the risk-utility analysis, not consumer expectation, for determining whether a product, alleged to be defective in design, was unreasonably dangerous; as such, it was reversible error for the trial court to instruct the jury to apply the consumer expectations test. Smith v. Mack Trucks, Inc., 819 So. 2d 1258, 2002 Miss. LEXIS 199 (Miss. 2002).

Where plaintiffs alleged that they were injured by the process utilized by defendants in treating wood with creosote and by the alleged waste that process may have caused, defendants were entitled to summary judgment on plaintiff's claims for failure to warn because the process and alleged waste was not a "product" within the scope of Miss. Code Ann. § 11-1-63. Andrews v. Kerr McGee Corp., 2001 U.S. Dist. LEXIS 25973 (N.D. Miss. Dec. 3, 2001).

The statute does not apply to an action commenced prior to its effective date. O'Flynn v. Owens-Corning Fiberglas, 759 So. 2d 526, 2000 Miss. App. LEXIS 205 (Miss. Ct. App. 2000).

3. Expert testimony.

Trial court properly barred a driver's claim under the Mississippi Products Liability Act because his experts failed to provide any testimony that a reasonable alternative design existed for a gating end terminal, and the remaining evidence was insufficient to raise a genuine issue of material fact as to whether the terminal was defectively designed; one expert's affidavit was an attempt to respond to companies' argument that the expert had not shown a feasible alternative design. Singley v. Trinity Highway Prods., LLC, 180 So. 3d 708, 2015 Miss. App. LEXIS 283 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 11 (Miss. 2016).

Consumer had not established that the failure to include a graphic adjacent to the written warning on the saw proximately caused his injury under Miss. Code Ann. § 11-1-63. Any testimony presented by the human factors expert that the absence of a graphic adjacent to the written warning on the table saw rendered the warning inadequate was therefore irrelevant and should have been excluded. Previto v. Ryobi N. Am., Inc., 766 F. Supp. 2d 759, 2010 U.S. Dist. LEXIS 141381 (S.D. Miss. 2010).

Where the consumer complained that the vehicle-equipped air bag failed to deploy during a car accident, she filed a products liability suit against the manufacturer but failed to call expert witnesses to prove that the car was defective at the time it left the manufacturer. The circuit court did not err by granting summary judgment for the manufacturer after finding that the consumer failed to present evidence that created a genuine issue of material fact to support her claims under Miss. Code Ann. § 11-1-63(a)(i)(1)-(3). Brown v. GMC, 4 So. 3d 400, 2009 Miss. App. LEXIS 137 (Miss. Ct. App. 2009).

In a product liability case in which a district court had excluded a driver's expert witnesses, the driver's claims under Miss. Code Ann. § 11-1-63 failed as a matter of law since, with the exclusion of her experts, she had insufficient evidence to create a genuine issue of material fact as to her defective design, defective manufacturer, and failure to warn claims. Williams v. Daimler Chrysler Corp., 2008 U.S. Dist. LEXIS 55123 (N.D. Miss. July 18, 2008), aff'd, 310 Fed. Appx. 747, 2009 U.S. App. LEXIS 5870 (5th Cir. Miss. 2009).

Because plaintiff's expert had no expertise in tire design, manufacture, or malfunction, his testimony was properly stricken as to causation under Fed. R. Evid. 702; without the testimony of causation, plaintiff failed to establish claim under Miss. Code Ann. § 11-1-63(a) and summary judgment for the manufacturer was proper. Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224, 2007 U.S. App. LEXIS 18450 (5th Cir. Miss. 2007).

Although a driver did not offer expert testimony as to the issue of whether the collision in which she was involved was severe enough to warrant deployment of an air bag in accordance with the car manufacturer's warranty that the air bag would deploy if the collision was "hard enough," the evidence offered by the driver, including testimony from a mechanic as to the severity of the damage sustained by the car, was sufficient to allow a jury to conclude that the collision was "hard enough" such that the air bag should have deployed and that the warranty was breached, rendering the manufacturer liable under Miss. Code Ann. § 11-1-63(a)(i)(4). Forbes v. GMC, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Summary judgment in favor of defendant casket company on a product liability claim was proper because no expert testimony was presented that demonstrated that the alternative glue would have allowed the wooden casket to last for an "indefinite" period of time. Moss v. Batesville Casket Co., 935 So. 2d 393, 2006 Miss. LEXIS 378 (Miss. 2006).

In a products liability suit filed against the manufacturer of a cleaning product that exploded, the testimony of plaintiff's expert as to the cause of the explosion was excluded because it was too speculative to be reliable. Kemp v. Biolab, Inc., 2005 U.S. Dist. LEXIS 34035 (S.D. Miss. June 22, 2005).

Directed verdict in favor of the corporation in the driver's products liability action was proper pursuant to the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, because there was no evidence that the driver or her husband relied on any express warranty or other factual representation about the air bag before the accident. Additionally, the driver offered no expert testimony to say that the air bag should have deployed in the collision. Forbes v. GMC, 929 So. 2d 958, 2005 Miss. App. LEXIS 716 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Directed verdict for defendant under Miss. R. Civ. P. 50(a) was proper in a products liability action under Miss. Code Ann. § 11-1-63 where a wife was injured in an automobile accident and there was evidence that her air bag did not deploy because the only express warranty made was that the automobile had air bags, there was no evidence that plaintiffs justifiably relied on statements in the owners' manual, and plaintiffs offered no expert testimony to show that the impact was hard enough that the air bag should have deployed. Forbes v. GMC, 2005 Miss. App. LEXIS 95 (Miss. Ct. App. Feb. 1, 2005), op. withdrawn, sub. op., 929 So. 2d 958, 2005 Miss. App. LEXIS 716 (Miss. Ct. App. 2005).

Trial court erred in allowing auto manufacturer's expert to provide lay testimony about air bag inflation technology court because the manufacturer failed to designate him as an expert before the deadline, and his "lay testimony" strayed into the realm of scientific, technical and specialized knowledge that could only be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Also the injured driver's family members were prejudiced by the expert's testimony as it rebutted their expert's testimony regarding their claim of defective design under the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63. Palmer v. Volkswagen of Am., Inc., 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), op. withdrawn, sub. op., 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

The district court properly ruled that expert testimony was irrelevant and properly excluded such testimony where the expert opined that a ladder had a manufacturing defect because there was no adhesion between the fiberglass and the polymer matrix making up the ladder, but failed to assess whether the ladder met ANSI standards. Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380, 1999 U.S. App. LEXIS 18463 (5th Cir. Miss. 1999), abrogated, Samantar v. Yousuf, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047, 2010 U.S. LEXIS 4378 (U.S. 2010).

4. Tobacco products.

Miss. Code Ann. § 11-1-63 was commonly referred to as the inherent characteristics defense and was just that; a defense that had to be pled and proven, rather than an outright bar, and the defense in Miss. Code Ann. § 11-1-63(b) did not bar any action for damages caused by cigarettes, as the defense only applied to a products liability action and, as with any other affirmative defense, the defense was a matter of proof. R. J. Reynolds Tobacco Co. v. King, 921 So. 2d 268, 2005 Miss. LEXIS 423 (Miss. 2005).

Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63, precludes all tobacco cases based on products liability against tobacco companies; hence, summary judgment was properly granted to tobacco companies on an asbestos company's claim that smoking by asbestos claimants had caused the damage to the asbestos claimants. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 2004 Miss. LEXIS 270 (Miss. 2004).

It was possible that the plaintiffs would be able to state a cause of action on the basis that the cigarettes at issue were defectively designed so as to render them unreasonably dangerous where the plaintiffs asserted that several thousand compounds had been found in cigarette smoke, including, for example, carbon monoxide, nicotine, carbon dioxide, benzene, formaldehyde, Polonium-210, ammonia, nicotine sulfate, freon 11, hydrogen cyanide, and certain liver toxins known collectively as "furans" and that some of these compounds had been deliberately added to the cigarettes. Thomas v. R.J. Reynolds Tobacco Co., 11 F. Supp. 2d 850, 1998 U.S. Dist. LEXIS 11277 (S.D. Miss. 1998).

Miss. Code Ann. § 11-1-63 precludes all product liability actions against tobacco companies; the harm from tobacco use has been well documented, and elimination of the sources of the harm would greatly reduce the desirability of cigarettes. Lane v. R. J. Reynolds Tobacco Co., 853 So. 2d 1144, 2003 Miss. LEXIS 211 (Miss. 2003), overruled in part, R. J. Reynolds Tobacco Co. v. King, 921 So. 2d 268, 2005 Miss. LEXIS 423 (Miss. 2005).

5. Substantial change.

In an action alleging that automatic doors malfunctioned and caused injury to the plaintiff, the plaintiff failed to show a lack of substantial change after the doors left the manufacturer where a third party replaced the threshold sensor with a sensor that had been rebuilt, without the knowledge or approval of the defendant manufacturer. Wolf v. Stanley Works, 757 So. 2d 316, 2000 Miss. App. LEXIS 144 (Miss. Ct. App. 2000).

6. Adequate warnings.

Plaintiff's attempt to prove her failure to warn claim through defendants' marketing materials and internal documents expanded the claim beyond the statutory scope of the Products Liability Act; the only pertinent question is whether the prescription drug label contained adequate warnings or instructions. Johnson & Johnson, Inc. v. Fortenberry, 234 So. 3d 381, 2017 Miss. LEXIS 421 (Miss. 2017).

Risperdal label warned physicians that tardive dyskinesia might develop in patients treated with antipsychotic drugs and whether antipsychotic drug products differed in their potential to cause tardive dyskinesia was unknown; the Risperdal label warned the doctor specifically of the danger of tardive dyskinesia in no uncertain terms and was sufficiently adequate as a matter of law. Johnson & Johnson, Inc. v. Fortenberry, 234 So. 3d 381, 2017 Miss. LEXIS 421 (Miss. 2017).

Widow presented sufficient evidence that the sandblasting company breached its duty to provide adequate warnings, as there was sufficient evidence for a jury to find that, between 1960 and 1970, the company knew or in light of reasonably available knowledge should have known about the danger inherent in the use of silica in sandblasting operations, even as it related to a so-called bystander such as the decedent. Miss. Valley Silica Co. v. Barnett, 227 So. 3d 1102, 2016 Miss. App. LEXIS 548 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 401 (Miss. 2017).

Homeowners' failure-to-warn claims against an odorant manufacturer and odorant distributor failed because the homeowners could not prove that ordinary users or consumers of odorant did not realize the potential for odorant fade. Elliott v. El Paso Corp., 181 So. 3d 263, 2015 Miss. LEXIS 457 (Miss. 2015).

Trial court erred in failing to grant a manufacturer's motion for judgment notwithstanding the verdict regarding a worker's failure to warn claim because the worker proffered no testimony that he read the instructions on a respirator or that had the instructions contained a use limitation or warning, such a warning or limitation would have altered his behavior. Mine Safety Appliance Co. v. Holmes, 171 So. 3d 442, 2015 Miss. LEXIS 189 (Miss. 2015).

Where an arrestee died after being tased, the brother's failure to warn claim against the taser company failed because the product warnings explicitly and repeatedly warned of the risks of serious injury and death, and the brother produced no evidence demonstrating that the warnings the company provided were inadequate. Williams v. City of Cleveland, 736 F.3d 684, 2013 U.S. App. LEXIS 22205 (5th Cir. Miss. 2013).

Although Mississippi imposed no post-sale duty to warn, Miss. Code Ann. § 11-1-63(c), there were numerous studies in existence prior to 2000 that linked joint cartilage toxicity with exposure to foreign substance. The presence of those studies raised a genuine issue of material fact as to whether the defendants reasonably should have known at the time of the plaintiff's surgery of the danger their product posed and thereby failed to provide sufficient warning. Cross v. Amtec Med., Inc., 2012 U.S. Dist. LEXIS 141508 (S.D. Miss. Sept. 30, 2012).

Mississippi law does not require the best and most obvious warning but only adequate warning. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

Warning may be held adequate as a matter of law where the adverse effect was one that the manufacturer specifically warned against. The presence or absence of anything in an unread owner's manual simply cannot proximately cause a plaintiff's damages. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

Warning was adequate as it not only warned of the potential of rear tip over, but also provided explicit directions on how to avoid the possibility of rear tip over. Further, the purchaser could not prove that the manual's inadequate warnings proximately caused his injury as he voluntarily made the decision to not read the manual. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

In plaintiffs' suit for injuries caused by exposure to lead paint used in an apartment building over the course of 70 years, the manufacturer was granted summary judgment as to plaintiffs' post-sale failure to warn claims because Miss. Code. Ann. § 11-1-63 did not impose such a duty; however, fact issues remained as to the product's defectiveness, causation, and damages based on measurable diminution of plaintiffs' mental abilities. Jones v. NL Indus., 2006 U.S. Dist. LEXIS 33714 (N.D. Miss. May 24, 2006).

With regard to a product liability claim under Miss. Code Ann. § 11-1-63(a)(i)(4), it is possible to rely on assertions in an ownership manual without having actually read them; thus, in a driver's breach of warranty suit against a car manufacturer, although the driver had not read the owner's manual prior to purchasing a car, the driver could show that she relied on a warranty in the ownership manual concerning air bags where the salesman conveyed that information to the driver prior to her purchase of the car. Forbes v. GMC, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Parents of a minor girl who died as a result of injuries sustained in a car crash when the air bags deployed did not have a valid argument that the warnings in the owner's manual for the car were inadequate. The parents and the daughters admittedly had not even read the owner's manual in which the warnings were found. Palmer v. Volkswagen of Am., Inc., 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Creating a post-sale duty to warn appeared to conflict with the language of Miss. Code Ann. § 11-1-63(a)(1) and the appellate court declined to create such a post-sale duty to warn. Even had defendants been aware of allegations of brake failure, they were under no duty to disclose them, and under the circumstances, where among the reports in the record, only two dealt with complaints of similar brake failures prior to the time the vehicle was purchased, admission of the prior incident reports occurring after the date of sale would have been more prejudicial than probative. Noah v. GMC, 882 So. 2d 235, 2004 Miss. App. LEXIS 172 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1150 (Miss. 2004).

Summary judgment dismissal of wrongful death claims based on failure to warn and defective design was affirmed, where the decedent was electrocuted after raising a broadcast antenna mast into a power line. Austin v. Will-Burt Co., 361 F.3d 862, 2004 U.S. App. LEXIS 3897 (5th Cir. Miss. 2004).

As defendant, the manufacturer of a liner installed in a lagoon where a worker drowned, gave a sufficient warning of the dangers of the liner in its contract with the general contractor. The dangerous nature of the liner that it became slippery when wet, also would have been known to the ordinary user; therefore, the trial court properly granted the manufacturer summary judgment on grounds that plaintiff failed to prove the manufacturer breached a duty to the deceased worker. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 2003 Miss. App. LEXIS 681 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 957 (Miss. 2004).

Manufacturer's telescoping mast was not defectively designed nor unreasonably dangerous when it left the manufacturer's control; it performed without incident for years and was labeled with adequate warnings pursuant to Miss. Code Ann. § 11-1-63 and the relatives' suit was dismissed. Austin v. Will-Burt Co., 232 F. Supp. 2d 682, 2002 U.S. Dist. LEXIS 26542 (N.D. Miss. 2002), aff'd, 361 F.3d 862, 2004 U.S. App. LEXIS 3897 (5th Cir. Miss. 2004).

In workers' suit against manufacturers and suppliers of asbestos-containing products, remand to state court was warranted because the in-state defendants were not fraudulently joined; the complaint contained allegations that could create liability for the in-state defendants which were allegedly responsible for selling defective products that caused injury to the workers. Arrington v. AC & S, Inc., 2002 U.S. Dist. LEXIS 27636 (S.D. Miss. Aug. 27, 2002).

Non-diverse pharmacies were fraudulently joined in the patients' negligence, fraud, and failure to warn action for damages based on injuries caused by the diverse manufacturers' diet drugs because, in the face of the specific allegations of the manufacturers' concerted, unabated fraud and concealment of the drugs' true risks from virtually everyone, no factual basis could have been drawn for the general, conclusory charge that the pharmacies knew or had reason to know of the risks. Louis v. Wyeth-Ayerst Pharms., Inc., 2000 U.S. Dist. LEXIS 22694 (S.D. Miss. Sept. 25, 2000).

In an action alleging that automatic doors malfunctioned and caused injury to the plaintiff, the plaintiff failed to show that adequate warnings or instructions were missing where at least one warning sticker was posted next to the doors and there was no evidence that the warning proposed by the plaintiff would have had any causative impact. Wolf v. Stanley Works, 757 So. 2d 316, 2000 Miss. App. LEXIS 144 (Miss. Ct. App. 2000).

7. Design defect.

Homeowners' design-defect claims against an odorant manufacturer and odorant distributor failed because the homeowners offered no proof of a feasible alternative odorant design. Elliott v. El Paso Corp., 181 So. 3d 263, 2015 Miss. LEXIS 457 (Miss. 2015).

Purchaser immediately noticed that the wheelchair did not include anti-tip tubes; he and his son immediately tried to install the tubes from his old chair onto his new one because the purchaser recognized that he needed them. Despite his recognition that the chair did not have the safety feature he needed, the purchaser voluntarily decided to ride around in it; therefore, the purchaser assumed the risk of using a chair without anti-tip tubes as a matter of law. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

Grant of summary judgment against the father in his action against the manufacturer and seller under theories of strict liability and negligence, alleging a design defect in a garage door opener and a failure to warn, was proper pursuant to Miss. Code Ann. § 11-1-63(f)(ii) where the manufacturer designed its garage door opener to raise and lower the door when someone physically activated the device. It did not design the opener to open unless someone manually operated it and thus, the father failed to show that the product failed to function as expected. Glenn v. Overhead Door Corp., 935 So. 2d 1074, 2006 Miss. App. LEXIS 60 (Miss. Ct. App.), cert. dismissed, 936 So. 2d 367, 2006 Miss. LEXIS 434 (Miss. 2006).

8. — Open and obvious danger.

Grant of summary judgment in favor of the employer and manufacturer in the employee's personal-injury action was proper because the employee needed no warning to understand the danger of coming into close proximity with the moving chains attached to a mule boy; he appreciated that it was a dangerous situation but did not turn off the machine. Green v. Allendale Planting Co., 954 So. 2d 1032, 2007 Miss. LEXIS 232 (Miss. 2007).

Trial court properly allowed a car manufacturer to present evidence that the danger of air bags opening were open and obvious to rebut the plaintiffs' inadequate warning claim. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

9. Feasible design alternative.

In a products-liability case following a house fire allegedly started by a device in a truck, an expert's description of one feasible design alternative failed as he changed his opinion from the witness stand, and refused to include an alternative adopted by the manufacturer, and did not provide sufficient data or support for a second alternative; his methodology failed Daubert's reliability test, and the design-defect claim also failed. Brown v. Ford Motor Co., 121 F. Supp. 3d 606, 2015 U.S. Dist. LEXIS 103878 (S.D. Miss. 2015).

District court properly granted judgment as a matter of law to the corporation on the employee's design defect claim under the Mississippi Products Liability Act (MPLA), Miss. Code Ann. § 11-1-63 et seq., because the employee did not present the requisite evidence for a reasonable jury to find that a door was a MPLA feasible design alternative, and the employee's only witness testifying about the forklift design, presented no opinion, however, that a door would be a MPLA feasible design alternative. Therefore, the evidence produced by the employee was not sufficient for a reasonable jury to find that the corporation's forklift had a design defect that rendered the forklift unreasonably dangerous. Guy v. Crown Equip. Corp., 394 F.3d 320, 2004 U.S. App. LEXIS 25986 (5th Cir. Miss. 2004).

In an action alleging that automatic doors malfunctioned and caused injury to the plaintiff, the plaintiff failed to show that a feasible alternative design existed at the time the door system was manufactured and installed where the plaintiff's own expert witness testified that the proposed alternative design had a short life expectancy, was likely to fail and result in accidents, and was very costly. Wolf v. Stanley Works, 757 So. 2d 316, 2000 Miss. App. LEXIS 144 (Miss. Ct. App. 2000).

10. Prima facie case.

In a driver's product liability suit pursuant to Miss. Code Ann. § 11-1-63(a)(i)(4), a circuit court erred in granting a directed verdict to a manufacturer; the driver set forth a prima facie case for breach of warranty where the driver introduced evidence tending to show that, inter alia: (1) the owner's manual for the manufacturer's car stated that the air bag would deploy if the collision were "hard enough"; (2) the driver relied on that warranty, which had been conveyed by a salesman prior to the driver's purchase of the car; (3) and where the collision was severe and was "hard enough" to warrant deployment of the air bag. Forbes v. GMC, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

While foreseeability is an element of proof required by Miss. Code Ann. § 11-1-63, a claimant must also offer a feasible design alternative. In the case at bar, fundamental to proving his prima facie case was plaintiff's burden of proving that: (1) the handgun (which fired when it was dropped), was unreasonably dangerous by showing that the product seller knew or should have known about the unreasonably dangerous condition of the handgun; (2) that the handgun failed to function as expected, and; (3) that there existed a feasible design alternative that would have, to a reasonable probability, prevented the harm complained of by plaintiff. Williams v. Bennett, 921 So. 2d 1269, 2006 Miss. LEXIS 46 (Miss. 2006).

In a products liability case alleging a manufacturing defect, plaintiff bears the burden of persuasion as to the issue of proximate cause. Plaintiff's failure to produce any evidence from which a reasonable juror could conclude that the claimed manufacturing defects proximately caused her accident is insurmountable. Johnson v. Davidson Ladders, Inc., 403 F. Supp. 2d 544, 2005 U.S. Dist. LEXIS

38806 (N.D. Miss. 2005), aff'd, 193 Fed. Appx. 349, 2006 U.S. App. LEXIS 20526 (5th Cir. Miss. 2006).

Manufacturer of a cleaning product that exploded was entitled to summary judgment in the user's action for products liability. The user failed to establish a material fact question on inadequate warning and proximate cause. Kemp v. Biolab, Inc., 2005 U.S. Dist. LEXIS 34035 (S.D. Miss. June 22, 2005).

Manufacturer was entitled to a motion for a judgment notwithstanding the verdicts, pursuant to Miss. Code. Ann. § 11-1-63, because the asbestos injury claimants failed to meet their burden of proof of showing that a dust mask and respirator were defective when made by the manufacturer, or that a required warning by the manufacturer was missing. 3M Co. v. Johnson, 895 So. 2d 151, 2005 Miss. LEXIS 43 (Miss. 2005).

Passengers' suit against a car dealer was subject to remand because the passengers' allegations–that the dealer sold a vehicle that was unreasonably dangerous, was defectively designed, and failed to contain adequate warnings–were sufficient to potentially state a cause of action for products liability against the dealer in state court. Thus, the dealer's citizenship, which destroyed complete diversity, could not be ignored for purposes of determining subject matter jurisdiction under 28 U.S.C.S. § 1332. Stanton v. Ford Motor Co., 2003 U.S. Dist. LEXIS 26554 (N.D. Miss. June 30, 2003).

Where the consumer alleged that the seller sold the consumer an all-terrain vehicle that was unreasonably dangerous, was defectively designed, and failed to contain adequate warnings, these allegations were sufficient to potentially state a cause of action for products liability against the seller under Miss. Code Ann. § 11-1-63. Jackson v. Kawasaki Motors Corp., 2003 U.S. Dist. LEXIS 26291 (N.D. Miss. Mar. 26, 2003).

Where there was at least one viable state-law claim with a possibility of recovery against the resident retail sellers with respect to the strict liability claim under Miss. Code Ann. § 11-1-63, joinder of the diabetics' claims was proper under Miss. R. Civ. P. 20; therefore, the the case was erroneously removed pursuant to 28 U.S.C.S. § 1332 and had to be remanded to the state court. Polk v. Lifescan, Inc., 2003 U.S. Dist. LEXIS 25762 (N.D. Miss. Sept. 19, 2003).

In a products liability action by minor passengers against the manufacturer and the seller of a vehicle for the injuries the passengers suffered in a one-vehicle accident, the passengers were entitled to have their case remanded to state court under 28 U.S.C.S. § 1447(c) after defendants removed it to federal court under 28 U.S.C.S. § 1441(a) on a claim that the passengers had fraudulently joined the seller as a defendant in order to defeat diversity jurisdiction under 28 U.S.C.S. § 1332(a), where the passengers stated a cause of action under Miss. Code Ann. § 11-1-63 by alleging that the seller sold a defective and unreasonably dangerous vehicle that caused the passengers' injuries. Stanton ex rel. Stanton v. Ford Motor Co., 2003 U.S. Dist. LEXIS 25157 (N.D. Miss. July 2, 2003).

Where the injured party asserted a products liability action pursuant to Miss. Code Ann. § 11-1-63 alleging that the manufacturer's defective water heater had caused the injured party's burns, the manufacturer was entitled to summary judgment under Miss. R. Civ. P. 56; the injured party was unable to show that the manufacturer's hot water heater had caused the injured party's burns, because the hot water heater had to comply with all mandatory and voluntary government and industry standards, and housing and urban development inspected the water heater after the incident and found nothing wrong. Moore v. Miss. Valley Gas Co., 863 So. 2d 43, 2003 Miss. LEXIS 601 (Miss. 2003).

As a wrongful death plaintiff failed to prove that defendant – the manufacturer of a liner installed in a lagoon where a worker drowned – defectively designed the liner, having presented no evidence of industry standards or customs and no expert opinion showing the availablity of an alternate design that would have prevented the alleged harm without impairing the usefulness of the product, the trial court properly granted the manufacturer summary judgment. Hobson v. Waggoner

Eng'g, Inc., 878 So. 2d 68, 2003 Miss. App. LEXIS 681 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 957 (Miss. 2004).

Decedent's beneficiaries made a prima facie case of products liability against the manufacturer of a tire that had separated treads with the testimony of a tire expert that the manufacturer had made the tire that had separated treads from bad stock and the testimony of two employees of the manufacturer that the manufacturer had knowingly and intentionally used bad stock in the manufacture of tires. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

11. Evidence.

Former owner of a meat grinder was entitled to summary judgment when an accident victim brought a failure-to-warn case because the victim failed to provide any evidence that the meat grinder was defective. The victim failed to present any evidence that the meat grinder was required to have a safety interlock feature, that the meat grinder violated any industry standard or regulatory requirement or that it failed to meet the manufacturer's specifications, and that anyone tampered with the meat grinder. Johnson v. T & T Farms, Inc., — So. 3d —, 2019 Miss. App. LEXIS 145 (Miss. Ct. App. Apr. 9, 2019).

Judgment was properly entered for a worker for silicosis-related injuries caused by a manufacturer's defective respirator because the worker's evidence was sufficiently reliable to rise above a mere post hoc ergo proptor hoc finding of causation; the worker offered evidence of extremely dusty work conditions and testimony that concrete contained silica and that he suffered from silicosis, an injury known to be caused by silica overexposure. Mine Safety Appliance Co. v. Holmes, 171 So. 3d 442, 2015 Miss. LEXIS 189 (Miss. 2015).

Trial court erred in denying a builder's motion for judgment notwithstanding the verdict because purchasers failed to provide sufficient evidence that reasonable jurors could not have found in favor of the builder; the purchasers did not substantiate a basis for a products-liability claim under Miss. Code Ann. § 11-1-63(a) because any damage they claimed from a misplaced wire was irrelevant since they never technically lived in or owned the home. Cavalier Home Builders v. Baughman, 126 So. 3d 899, 2012 Miss. App. LEXIS 790 (Miss. Ct. App. 2012), cert. dismissed, 2013 Miss. LEXIS 626 (Miss. Dec. 5, 2013).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the homeowners offered only mere proof of damage following the use of the windows, which was insufficient under Miss. Code Ann. § 11-1-63(a), (b), and (f). The fact that their windows leaked and rotted was insufficient for the design-defect claim to survive the motion for summary judgment. McKee v. Bowers Window & Door Co., 64 So. 3d 926, 2011 Miss. LEXIS 218 (Miss. 2011).

Per the plain language of the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63(c)(i) (2004), critical to the district court's inquiry into a failure-to-warn claim was the question of what the manufacturers knew and what knowledge was reasonably available to them and as knowledge accumulates over time, prior knowledge of harm that predated plaintiffs' employment was relevant to a question of current knowledge; evidence that some members of the welding industry had warnings on their products as far back as the 1940s, which were later removed due to concerns about the financial implications of such warnings, was directly relevant to rebut testimony. Accordingly, given the relevance of these documents to plaintiffs' failure-to-warn claim under Mississippi law, the district court did not abuse its discretion in admitting them over the manufacturers' objection. Jowers v. Lincoln Elec. Co., 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

Trial court did not err in granting a manufacturer and an automobile dealership summary judgment in a breach of warranty action filed by a driver and her husband because they produced insufficient evidence of causation pursuant to

Miss. Code Ann. § 11-1-63(a); there had to be proof from which a jury could conclude that the vehicle's airbag would have prevented the driver's injuries, but there was no evidence from which a reasonable jury could conclude that but for the breach of warranty, the driver would not have been injured or her injuries would have been mitigated, Rowan v. Kia Motors Am., 16 So. 3d 62, 2009 Miss. App. LEXIS 533 (Miss. Ct. App. 2009).

Former police officer's recollection of being told that it was "extremely hard" to grab a weapon from a certain model holster corresponded closely to the "extremely difficult" language used in defendants' advertisement. The officer's testimony regarding the holster's reputation for weapon retention suggested that representations regarding that quality were at least part of what made him purchase it, Miss. Code. Ann. § 11-1-63(a)(1)(4). Johnson v. Michaels of Or. Co., 2009 U.S. Dist. LEXIS 17870 (N.D. Miss. Feb. 23, 2009).

Because a product liability action established by Miss. Code Ann. § 11-1-63 was subject to a comparative fault defense, evidence of plaintiff's alcohol and drug use before riding an all-terrain vehicle (ATV), even though he was not legally intoxicated when he was hurt in an ATV accident, was not subject to exclusion on a motion in limine because it was relevant to the issue of contributory negligence under Miss. Code Ann. § 11-7-15. Fife v. Polaris Indus., Inc., 2008 U.S. Dist. LEXIS 9882 (S.D. Miss. Jan. 15, 2008).

12. Jury instruction.

Trial court erred in giving a certain instruction without specifying every essential element of a negligent misrepresentation claim; the instruction omitted an essential element of the claim, specifically the requirement that the representation or omission was material or significant. Johnson & Johnson, Inc. v. Fortenberry, 234 So. 3d 381, 2017 Miss. LEXIS 421 (Miss. 2017).

Defendants argued that the case did not concern the adequacy of any instructions regarding Risperdal, but this argument was rejected because the statute clearly provided that a product may be defective because it failed to contain adequate warnings or instructions, and the inclusion of the word "instructions" was not improper. Johnson & Johnson, Inc. v. Fortenberry, 234 So. 3d 381, 2017 Miss. LEXIS 421 (Miss. 2017).

Combination of the claims for negligent marketing and negligent misrepresentation as if they were the same claim, sharing the same elements, was misleading and improper; a negligent marketing or negligent advertising claim is not cognizable under Mississippi law to the extent that it is not part of a claim for negligent misrepresentation. Johnson & Johnson, Inc. v. Fortenberry, 234 So. 3d 381, 2017 Miss. LEXIS 421 (Miss. 2017).

Because the jury was instructed pursuant to the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, the trial court did not need to present the jury with a separate negligence instruction on inadequate warnings. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

13. Asbestos cases.

In an asbestos case alleging failure to warn, a manufacturer was not entitled to a sophisticated user/learned intermediary defense because (1) the manufacturer did not show the manufacturer warned an injured employee's employer of a product's hazards, and (2) a reasonable jury could conclude the manufacturer's warnings to customers as a whole was inadequate. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

Trial court erred by granting a judgment notwithstanding the verdict to the asbestos suppliers and distributor by applying the survivors' proof to the "frequency, regularity, and proximity" test instead of the statutory elements of a design defect products liability claim, because the test was to be applied solely in the context of summary judgment or directed verdict, and nothing in the Mississippi Products Liability Act created a separate class of litigation for asbestos cases. Smith v. Union Carbide Corp., 130 So. 3d 66, 2013 Miss. LEXIS 642 (Miss. 2013).

In asbestos litigation in Mississippi, the proper test to be used is the frequency, regularity, and proximity standard to show product identification of the defendants' actual products, exposure of the plaintiffs to those products, and proximate causation as to the injuries suffered by the plaintiffs. In the case at bar, the workers fell well short of meeting the Lohrmann test as adopted by the Mississippi Supreme Court in Gorman-Rupp Co. v. Hall, 908 So.2d 749 (Miss. 2005); for those reasons, the supreme court reversed the circuit court's denial of summary judgment and rendered judgment in favor of the chemical company. Monsanto Co. v. Hall, 912 So. 2d 134, 2005 Miss. LEXIS 765 (Miss. 2005).

14. Reliance.

Purchaser did not present any evidence that the manufacturers made an express representation to him about the wheelchair, or any evidence that the purchaser relied on any information from the manufacturer at all; indeed, there was no evidence that the manufacturers had any interaction with the purchaser at all since the seller handled the sale. Therefore there was no factual or legal basis for a breach of an express warranty claim under the Mississippi Products Liability Act. McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835, 2010 U.S. Dist. LEXIS 10710 (S.D. Miss. 2010).

In a personal injury products liability lawsuit, the tire maker argued that the decedent's estate failed to prove that there was a manufacturing defect in the tire when it left the control of the maker or the seller; the maker claimed that the estate failed to show any actual deviation in the tire from the manufacturer's specifications. However, the theory on which the case went to the jury was not that of a manufacturing-defect theory, but instead it was that the tire breached an express warranty or failed to conform to other express factual representations upon which the decedent justifiably relied in using the product pursuant to Mississippi Code Annotated section 11-1-63(a)(i)(4); therefore, there was no merit to the assignment of error. Goodyear Tire & Rubber Co. v. Kirby, 156 So. 3d 281, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. 2009).

15. Preservation for review.

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the homeowners' warranty claims were procedurally barred. The homeowners never, over the course of filing three complaints, pleaded claims for breach of implied or express warranty against the seller and that critical fact fundamentally distinguished the case from the warranty decisions relied upon by the homeowners. McKee v. Bowers Window & Door Co., 64 So. 3d 926, 2011 Miss. LEXIS 218 (Miss. 2011).

16. Proximate cause.

Trial court erred in granting manufacturers' motion for judgment notwithstanding the verdict (JNOV) because a widow presented sufficient evidence from which a reasonable juror could find that her husband was exposed to the manufacturers' products to a sufficient degree such that they could have been a proximate cause of his lung cancer. Smith v. Union Carbide Corp., 200 So. 3d 1035, 2016 Miss. LEXIS 399 (Miss. 2016).

Trial court erred in denying a manufacture's motion for judgment notwithstanding the verdict on the issue of a worker's misuse of a respirator because the worker failed to show that the manufacturer was the proximate cause of his injury the worker's testimony overwhelmingly showed the respirator was misused, and that the misuse materially altered the product's condition after it left the manufacturer's control. Mine Safety Appliance Co. v. Holmes, 171 So. 3d 442, 2015 Miss. LEXIS 189 (Miss. 2015).

Circuit court abused its discretion in granting a new trial, when a claimant alleged that a seller of sand's failure to provide adequate warnings of the dangers of the inhalation of respirable silica caused the claimant's silicosis, because insufficient evidence was adduced at trial to prove, by a preponderance of the evidence, that the seller's sand caused the claimant's silicosis. Dependable Abrasives, Inc. v. Pierce, 156 So. 3d 891, 2015 Miss. LEXIS 51 (Miss. 2015).

Summary judgment was granted to a manufacturer in a product liability case under Miss. Code Ann. § 11-1-63 due to a lack of proximate causation; neither the manufacturer's failure to warn nor its alleged design defect proximately caused a renter's eye injuries from a bungee cord. The renter's awareness of the allegedly dangerous condition was fatal to a failure-to-warn claim; as to a design-defect claim, there was testimony that the renter would have attempted to restrain a machine's movement, even if the wheels of the machine had been locked. Berry v. E-Z Trench Mfg., 772 F. Supp. 2d 757, 2011 U.S. Dist. LEXIS 15940 (S.D. Miss. 2011).

17. Innocent seller.

Mississippi Products Liability Act's innocent seller provision entitled a seller to summary judgment for selling homeowners defective drywall because selling salvaged drywall as new was not excepted, as (1) the seller did not know the defects, (2) no labeling as new or alteration caused the harm alleged, and (3) knowing the drywall was salvaged was not knowledge of defects. Holifield v. City Salvage, Inc., 230 So. 3d 736, 2017 Miss. App. LEXIS 115 (Miss. Ct. App.), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 483 (Miss. 2017).

Consumer's claims against the brand manufacturers of metoclopramide failed as the Mississippi Products Liability Act shielded the brand manufacturers from liability for products they did not create; the consumer did not ingest the brand manufacturers' products. Lashley v. Pfizer, Inc., 750 F.3d 470, 2014 U.S. App. LEXIS 3207 (5th Cir. Miss. 2014).

Mother's motion to amend her complaint under Fed. R. Civ. P. 60 to add a medical retail store as a defendant in her action seeking damages for her son's injury in a wheelchair was denied because the mother voluntarily dismissed the store under Fed. R. Civ. P. 41(a)(2), the statute of limitations of Miss. Code Ann. § 15-1-49 had expired, and the court failed to perceive any legitimate basis for the mother's insistence that she was duped into believing that she had purchased the wheelchair by the "innocent seller" arguments of the store and the wheelchair's manufacturer under Miss. Code Ann. § 11-1-63. Braswell v. Invacare Corp., 760 F. Supp. 2d 679, 2010 U.S. Dist. LEXIS 140025 (S.D. Miss. 2010).

RESEARCH REFERENCES

ALR.

See A.L.R. Index to Annotations under Products Liability.

Products Liability: Ladders. 81 A.L.R.5th 245.

Products liability: Manufacturer's post-sale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

The government-contractor defense to state products – liability claims. 53 A.L.R.5th 535.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive. 54 A.L.R.5th 1.

Products liability: firearms, ammunition, and chemical weapons. 96 A.L.R.5th 239.

Am. Jur.

63 Am. Jur. 2d, Products Liability §§ 1, 2 et seq.

18A Am. Jur. Pl & Pr Forms (Rev), Negligence, Form 73.1 (Complaint, petition, or declaration – By bicyclist – Struck by automobile-Against manufacturer of slotted drainage grate placed in sidewalk).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability §§ 1 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 61.1 (Complaint, petition, or declaration – Against manufacturer and distributor of swimming pools-Negligent design and failure to warn).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 111.1 (Complaint, petition, or declaration – Against manufacturer and seller – Negligent design and breach of warranties for trailer and sliding tandem bogey).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 143.1 (Answer-Defense – Statutory bar).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 143.2 (Answer – Defense – Assumption of risk by plaintiff).

20A Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 216.2 (Complaint in federal court – Against manufacturers of blood product contaminated with AIDS virus – Alternate liability theory).

20A Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 291.1 (Complaint, petition, or declaration – Action against manufacturers of asbestos products and distributors of diatomaceous earth – By employee).

46 Am. Jur. Trials 631, The Use of Biomechanical Experts in Product Liability Litigation.

Law Reviews.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part I. 16 Miss. C. L. Rev. 393, Spring, 1996.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, Spring, 1997.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

§ 11-1-64. Repealed.

Repealed by Laws, 2004, 1st ex. Sess., ch. 1, § 7, eff September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

[Laws, 2002, 3rd Ex Sess, ch. 4, § 4, eff from and after Jan. 1, 2003.]

Editor's Notes — Former § 11-1-64 provided the procedure for dismissing a defendant whose liability is based solely on his status as a seller in the stream of commerce.

Laws of 2004, 1st ex. Sess., ch. 1, § 20, provides:

"SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004."

§ 11-1-65. Punitive damages; limitations.

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f)(i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(2) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same.

(3)(a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars ($20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($1,000,000,000.00);

(ii) Fifteen Million Dollars ($15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($750,000,000.00) but not more than One Billion Dollars ($1,000,000,000.00);

(iii) Five Million Dollars ($5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($750,000,000.00);

(iv) Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($100,000,000.00) but not more than Five Hundred Million Dollars ($500,000,000.00);

(v) Two Million Five Hundred Thousand Dollars ($2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($50,000,000.00) but not more than One Hundred Million Dollars ($100,000,000.00); or

(vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($50,000,000.00) or less.

(b) For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.

(c) The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.

(d) The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

(4) Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur where appropriate.

HISTORY: Laws, 1993, ch. 302, § 2; Laws, 2002, 3rd Ex Sess, ch. 4, § 6; Laws, 2004, 1st Ex. Sess., ch. 1, § 4, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

Editor's Notes — Laws of 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

Cross References — Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Breach of contract.
3. Torts.
4. Availability.
5. Bifurcated trials.
6. Bifurcated claims.
7. Burden of proof.
8. Calculation of net worth.
9. Attorney's fees.

1. In general.

Trial court did not err in submitting the issue of punitive damages to the jury, as the jury heard evidence that the sandblasting company placed no warning on its sandbags even though silicosis had been a known danger of sandblasting for decades and the evidence permitted an inference that the company did nothing at all to warn of a known and deadly risk. Miss. Valley Silica Co. v. Barnett, 227 So. 3d 1102, 2016 Miss. App. LEXIS 548 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 401 (Miss. 2017).

Trial court did not abuse its discretion by ruling that a jury instruction on gross negligence was not to be presented as a separate cause of action, but was more appropriate in the context of determining punitive damages only after a determination of liability against an attorney. White v. Nelson, 196 So. 3d 1039, 2016 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 202 So. 3d 612, 2016 Miss. LEXIS 332 (Miss. 2016).

Bankruptcy court refused to reconsider its ruling that a judgment an injured party obtained in a Mississippi court was nondischargeable under 11 U.S.C.S. § 523(a)(6) because the debtor committed a willful and malicious injury when he assaulted the injured party, or to review the state court's judgment awarding actual and punitive damages. Under the Rooker-Feldman doctrine, the question of whether the state court incorrectly assessed damages had to be answered by the state court, and while the judgment entered by the state court appeared to be inconsistent with Miss. Code Ann. § 11-1-65, insofar as the award of punitive damages was concerned, it was not void under Mississippi law and was not subject to collateral attack in the bankruptcy court. Montgomery v. Canerdy (In re Canerdy), 2010 Bankr. LEXIS 2230 (Bankr. N.D. Miss. July 6, 2010).

Award of punitive damages was appropriate under Miss. Code Ann. § 11-1-65(1)(a) because the jury returned a verdict finding that the appellee daughter had misappropriated her mother's assets and the record before the appellate court supported the findings of the jury and the chancellor. Ultimately, the decision to award punitive damages was within the discretion of the chancellor as fact-finder, and there was no error with that decision. DeMoville v. Johnson (In re DeMoville P'ship), 26 So. 3d 366, 2009 Miss. App. LEXIS 286 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 37 (Miss. 2010), cert. denied, 2010 Miss. LEXIS 32 (Miss. Jan. 28, 2010).

In an insurance dispute involving a bad faith claim, an insurer's motion to bifurcate the compensatory and punitive damages phases of trial was granted because it was consistent with the provisions of Miss. Code. Ann. § 11-1-65. Simpson v. Econ. Premier Assur. Co., 2006 U.S. Dist. LEXIS 64603 (N.D. Miss. Sept. 8, 2006).

In an insurance dispute involving a bad faith claim, an insurer's motion to prohibit the admission of evidence of its net worth was granted as to the compensatory damages phase of the bifurcated trial, but Miss. Code. Ann. § 11-1-65 required that the trier of fact consider such evidence at the punitive damages stage of trial. Simpson v. Econ. Premier Assur. Co., 2006 U.S. Dist. LEXIS 64603 (N.D. Miss. Sept. 8, 2006).

If the jury awards compensatory damages, then an evidentiary hearing is conducted in the presence of the jury; therefore, in a contract case, a circuit court erred when it failed to conduct an evidentiary hearing on the issue of punitive damages under Miss. Code Ann. § 11-1-65. Bradfield v. Schwartz, 936 So. 2d 931, 2006 Miss. LEXIS 449 (Miss. 2006).

Trial court erred when it failed to conduct an evidentiary hearing on the issue of punitive damages pursuant to the statutory mandates of Miss. Code Ann. § 11-1-65(1)(c), which expressly provided that if a properly instructed jury returned a verdict for compensatory damages against a party, the trial court "shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered." Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 192 So. 577, 1940 Miss. LEXIS 205 (Miss. 1940).

When the jury returned a verdict which resulted in a compensatory damages award, a punitive damages phase of trial should have automatically proceeded, consistent with the applicable statutory provisions of Miss. Code Ann. § 11-1-65(1). Bradfield v. Schwartz, 2006 Miss. LEXIS 268 (Miss. May 18, 2006), sub. op., 936 So. 2d 931, 2006 Miss. LEXIS 449 (Miss. 2006).

In order for punitive damages to be awarded, the plaintiff must demonstrate a willful or malicious wrong, or a gross, reckless disregard for the rights of others; punitive damages are only appropriate in the most egregious cases. A bank customer was not entitled to punitive damages for a bank teller's fraudulent withdrawal of money from the customer's account where: (1) the bank made prompt restitution; (2) the act complained of was committed solely by a single bank teller; (3) the bank's investigation of the matter was complete, thorough, and proper; and (4) considering the totality of the circumstances, the bank's conduct indicated a thorough attempt to satisfactorily resolve the matter. Wise v. Valley Bank, 861 So. 2d 1029, 2003 Miss. LEXIS 874 (Miss. 2003).

A proposed settlement amount of $ 4.4 million (6.5% of defendant's net worth), in an action largely involving compliance with governmental guidelines and not involving terrible personal injuries, was well within any arguable zone of reasonableness. Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 2003 U.S. Dist. LEXIS 11070 (S.D. Miss. 2003), aff'd, 91 Fed. Appx. 952, 2004 U.S. App. LEXIS 4955 (5th Cir. Miss. 2004).

In borrowers' suit arising from allegedly fraudulent loan transactions, remand was not necessary, because agents were fraudulently joined and the $ 75,000 jurisdictional threshold was met based upon the unspecified claims for punitive damages. Ross v. First Family Fin. Servs., Inc., 2002 U.S. Dist. LEXIS 23212 (N.D. Miss. Aug. 26, 2002).

Punitive damages were properly awarded in a case where two armed bail bondsmen entered a mother's home without a search warrant or other authority looking for her son, who had jumped bail. Milburn v. Vinson, 850 So. 2d 1219, 2002 Miss. App. LEXIS 562 (Miss. Ct. App. 2002), cert. dismissed, 2004 Miss. LEXIS 607 (Miss. May 27, 2004).

Trial court did not err in refusing to grant decedent's estate's request for a jury instruction covering punitive damages in a wrongful death suit against a corporation arising out of a car accident, when the evidence did not support a punitive damages instruction in light of the fact that, although the corporation's employee was negligent in the operation of the tractor-trailer, he was not grossly negligent. Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 2002 Miss. LEXIS 181 (Miss. 2002).

Punitive damages pursuant to Miss. Code Ann. § 11-1-65 (1994) were undivided claims of right with a potentially separable award and collectively exceeded the diversity jurisdiction amount. Remand of action to State court was thus denied. Agnew v. Commercial Credit Corp., 2002 U.S. Dist. LEXIS 15060 (S.D. Miss. July 11, 2002).

It was error for the court to refuse to submit the issue of punitive damages to the jury in an action for invasion of privacy by disclosure of private facts and intentional infliction of emotional distress, notwithstanding the trial court's determination that the defendant son acted out of a vendetta toward what he perceived to be improper business activity by a timber company in its relations with the plaintiff father, rather than out of malice toward his father, because the vendetta did not give the son the right to recklessly disregard his father's right to privacy and did not justify the outrageous conduct demonstrated by the son in subjecting his father to commitment proceedings to further his own interests. McCorkle v. McCorkle, 811 So. 2d 258, 2001 Miss. App. LEXIS 9 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, the defendant corporation, which owned the truck that struck the plaintiff's vehicle, was entitled to summary judgment on the plaintiff's claim for punitive damages since (1) there was no evidence that the driver of the truck acted with the necessary extreme conduct which would allow a reasonable jury to return a verdict for punitive damages against him individually, (2) the corporation could not be held liable for punitive damages on the basis of vicarious liability, and (3) there was no evidence that the corporation acted with actual malice or gross negligence or committed fraud in its screening, training, or monitoring of its drivers or in failing to remove unsafe drivers from the road. Hasty v. George, 2000 U.S. Dist. LEXIS 444 (N.D. Miss. Jan. 10, 2000).

An action for retaliatory discharge and tortious breach of contract was a contract action to which this section did not apply. Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 1999 Miss. LEXIS 343 (Miss. 1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2219, 147 L. Ed. 2d 251, 2000 U.S. LEXIS 3836 (U.S. 2000).

Chancellor did not abuse his discretion in determining that punitive damages were appropriate where the plaintiffs clearly and convincingly proved that the defendant acted fraudulently. Holland v. Mayfield, 826 So. 2d 664, 1999 Miss. LEXIS 195 (Miss. 1999).

Punitive damages are only appropriate in the most egregious cases so as to discourage similar conduct in the future and should only be awarded in cases where the actions are extreme. Thomas v. Harrah's Vicksburg Corp., 734 So. 2d 312, 1999 Miss. App. LEXIS 59 (Miss. Ct. App. 1999).

The trial court's decision to permit the jury to consider both compensatory and punitive damages at the same time at a point when, if the jury had been properly instructed, the issue of whether compensatory damages were to be awarded had not been resolved was in direct contravention of the statute, and, therefore, error. Harbin v. Jennings, 734 So. 2d 269, 1999 Miss. App. LEXIS 47 (Miss. Ct. App. 1999).

Under Mississippi law, customer could not receive punitive damages from casino for injuries sustained when cocktail waitress spilled hot coffee on his back, where customer admitted that someone bumped into waitress causing her to spill her tray of drinks and that waitress did not act with either malice or gross negligence. Spann v. Robinson Prop. Group, L.P., 970 F. Supp. 564, 1997 U.S. Dist. LEXIS 13037 (N.D. Miss. 1997).

Question of whether punitive damages could be recovered from life insurer in suit alleging tortious breach of contract, breach of fiduciary duties, and fraud was governed by common law, not by punitive damages statute. American Funeral Assur. Co. v. Hubbs, 700 So. 2d 283, 1997 Miss. LEXIS 249 (Miss. 1997).

2. Breach of contract.

In a case in which a jury awarded a judgment in favor of an insurance company after determining that the insureds had not demonstrated all of the necessary elements of their breach of contract claim by a preponderance of the evidence and the insureds filed a motion for reconsideration of summary judgment denying bad faith punitive damages, substantial evidence supported the jury's determination that the insureds did not prove their breach of contract claim, which also required dismissal of their tortious breach of contract claim. Pursuant to Miss. Code Ann. § 11-1-65, since they were not entitled to compensatory damages, they also were not entitled to punitive damages. Bryant v. Prime Ins. Syndicate, Inc., 2010 U.S. Dist. LEXIS 40976 (S.D. Miss. Apr. 27, 2010).

In an insured's bad faith breach of contract suit against an insurer, the insured's claim for punitive damages under Miss. Code Ann. § 11-1-65(1)(a) was not sent to the jury because the evidence showed that the insurer undertook a proper investigation into the insured's alleged disability before denying extended benefits, and thus, the insurer had not acted with malice, fraud, or gross negligence. Tarver v. Colonial Life & Accident Ins. Co, 294 Fed. Appx. 873, 2008 U.S. App. LEXIS 20777 (5th Cir. Miss. 2008).

In an action against an attorney for legal malpractice and tortious breach of contract, it was error to allow the issue of punitive damages to go the jury on the cause of action for breach of contract. Hurst v. Southwest Miss. Legal Servs. Corp., 708 So. 2d 1347, 1998 Miss. LEXIS 116 (Miss. 1998).

3. Torts.

Punitive damages award against a drug manufacturer was affirmed where it stated that the award was reasonably and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition and that the evidence clearly supported an ongoing need to deter the manufacturer and others from engaging in fraudulent profit taking at the cost of the public trust, the public funds, the Medicaid program itself and the beneficiaries of the program, and it further explained that the manufacturer's conduct was clearly reprehensible and had continued for a long period of time, and that the manufacturer clearly was aware of the misconduct and had attempted to conceal its actions. Watson Labs., Inc. v. State, 241 So. 3d 573, 2018 Miss. LEXIS 7 (Miss. 2018).

There was sufficient evidence to meet the "clear and convincing" standard required for punitive damages under Miss. Code Ann. § 11-1-65 in the employees' intentional tort action against the employer and the court's determination of the employer's net worth at the time of judgment was proper. Franklin Corp. v. Tedford, 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

Applying net worth of the employer at the time of trial in a workmans' compensation case relating to intentional conduct of the employer, the circuit court properly reduced an award of punitive damages, pursuant to Miss. Code Ann. § 11-1-65(3)(a)(v). Franklin Corp. v. Tedford, 2009 Miss. LEXIS 169 (Miss. Apr. 16, 2009).

In a products liability action alleging three welding rod manufacturers' failure to warn, the court denied the manufacturers' postverdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) with respect to the $1.7 million in punitive damages awarded by the jury to the professional welder under Miss. Code Ann. 11-1-65; the jury was presented with evidence regarding what the manufacturers knew about the hazard of brain damage caused by manganese toxicity from welding fume exposure, when they knew it, what they did and did not do to investigate it, what actions they took and language they used to warn about it, and when, what the ongoing state of scientific knowledge was about it, and what standards were set by government and industry. All of these factors were relevant to the question of punitive damages, and the evidence presented showed that none of these factors was so weighty that it immunized the manufacturers from a jury finding that they acted with a willful, wanton, or reckless disregard for the safety of others; considering all of the evidence in the light and with all reasonable inferences most favorable to the professional welder, a reasonable jury could have concluded there was sufficient evidence to support an award of punitive damages. Jowers v. BOC Group, Inc., 608 F. Supp. 2d 724, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. 2009), vacated, in part, 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

In a products liability action alleging three welding rod manufacturers' failure to warn, the court denied the manufacturers' postverdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) with respect to the $1.7 million in punitive damages awarded by the jury to the professional welder under Miss. Code Ann. 11-1-65 because the manufacturers provided no warning regarding the hazard of the brain injury the professional welder suffered despite substantial evidence of their knowledge that exposure to welding fumes could cause brain damage. Jowers v. BOC Group, Inc., 608 F. Supp. 2d 724, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. 2009), vacated, in part, 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

Where a married couple, in their products liability action against three welding rod manufacturers, advanced a valid justification for the award of attorneys' fees that was widely recognized and accepted by courts applying Mississippi law: i.e., the manufacturer's acted with gross negligence which evidences a willful, wanton or reckless disregard for the safety of others pursuant to Miss. Code Ann. § 11-1-65(1)(a), and the proofs presented at trial provided a sufficient basis for a reasonable jury to conclude, by clear and convincing evidence, that the manufacturers were liable for punitive damages, the district court exercised its discretion to grant the married couple's motion under Fed. R. Civ. P. 54(d) for an attorney's fee award. Jowers v. BOC Group, Inc., 608 F. Supp. 2d 724, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. 2009), vacated, in part, 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

Because the finding that appellee operated the parties' company with gross negligence, evidencing a willful, wanton, or reckless disregard for the financial security of the company, was supported by substantial evidence, the chancellor did not err by awarding appellant punitive damages based on appellee's operation of the company; appellee admitted that he used the company's funds for his personal expenses and for the expenses of his other two businesses, and the court-appointed accountant and the chancellor found that the company's financial records were not properly maintained and were in poor condition. Griffith v. Griffith, 997 So. 2d 218, 2008 Miss. App. LEXIS 715 (Miss. Ct. App. 2008).

In a medical malpractice and wrongful death case, where there was no evidence that the doctor demonstrated a wilful or malicious wrong or a gross and reckless disregard for the rights of others, an award of punitive damages was improper. Further, punitive damages should not have automatically been submitted to the jury by the trial court; rather, a jury should only be permitted to consider punitive damages if the trial judge determines, under the totality of the circumstances and in light of the defendant's conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard for the rights of others. Causey v. Sanders, 998 So. 2d 393, 2008 Miss. LEXIS 520 (Miss. 2008).

In an action in which a beneficiary filed suit against an insurance company alleging claims of tortious breach of contract, breach of fiduciary duty and duty of good faith and fair dealing, negligence, gross negligence, and intentional infliction of emotional distress, the insurance company was granted summary judgment where: (1) the insured executed a voluntary statement to police that her husband had stabbed her with a knife and a month after the knife wound, the insured died in her bed; (2) no reasonable juror could conclude that the insurance company acted with malice, gross negligence, or reckless disregard in wanting to review the autopsy report; and (3) the delay in receiving the autopsy report was due in part to the beneficiary's failure to inform them of his address change. Washington v. Am. Heritage Life Ins. Co., 500 F. Supp. 2d 610, 2007 U.S. Dist. LEXIS 54120 (N.D. Miss. 2007).

In a debtor's conversion action against a bank, the trial court erred in denying the bank's motion for JNOV as to punitive damages as the only evidence that remotely approached one of the statutory requirements was a bank employee's alleged out-of-court statement regarding his intention to put the debtor out of business. This self-serving hearsay statement was not clear and convincing evidence of actual malice, gross negligence, or the commission of actual fraud. Cmty. Bank v. Courtney, 884 So. 2d 767, 2004 Miss. LEXIS 1321 (Miss. 2004).

In a property owner's trespass suit against a construction company which removed trees from his property, the trial court did not err in refusing to submit the issue of punitive damages to the jury as the evidence showed that the company thought the property in question belonged to the neighbor (who hired the company) and did not reenter the property once it was aware of the trespass. Teasley v. Buford, 876 So. 2d 1070, 2004 Miss. App. LEXIS 617 (Miss. Ct. App. 2004).

Award of punitive damages in favor of the borrower in the borrower's action for conversion was improper under Miss. Code Ann. § 11-1-65 because there was insufficient evidence to support a jury charge on that issue. A self-serving hearsay statement by a bank employee that he was going to put the borrower out of business was in no way clear and convincing evidence of actual malice, gross negligence, or the commission of actual fraud. Cmty. Bank v. Courtney, 2004 Miss. LEXIS 656 (Miss. June 10, 2004).

Once a jury returned a verdict in a customer's favor on a claim sounding in conversion, it was the appropriate time to consider the issue of an unresolved claim for punitive damages under Miss. Code Ann. § 11-1-65(1)(c). Brown v. N. Jackson Nissan, Inc., 856 So. 2d 692, 2003 Miss. App. LEXIS 891 (Miss. Ct. App. 2003).

Even assuming that a trial court erred when it failed to take up punitive damages without any further prompting from a customer after a jury awarded damages on a claim sounding in conversion, the customer waived his right to complain by not raising the issue while the jury was still empaneled. Brown v. N. Jackson Nissan, Inc., 856 So. 2d 692, 2003 Miss. App. LEXIS 891 (Miss. Ct. App. 2003).

Trial court did not commit plain error when it failed to proceed on punitive damages after a jury returned a verdict of actual damages on a customer's claim sounding in conversion; the customer had no fundamental right to a possible assessment of punitive damages because he had already been made whole by the verdict for actual damages. Brown v. N. Jackson Nissan, Inc., 856 So. 2d 692, 2003 Miss. App. LEXIS 891 (Miss. Ct. App. 2003).

Employee admitted to not following the store policy regarding shoplifters, ignored the policy, followed the guest from the store on her own initiative, accused the guest of shoplifting, and committed the tort of assault by grabbing the guest by her underwear; because there was no proof that the store had any knowledge of prior incidents committed by the employee and the employee was acting on her own initiative, pursuant to Miss. Code Ann. § 11-1-65(1)(a), punitive damages against the store should not have been allowed and the appellate court reversed and rendered the punitive damages assessed against the store. Gamble v. Dollar Gen. Corp., 852 So. 2d 5, 2003 Miss. LEXIS 352 (Miss. 2003).

In a products liability case, the trial court did not err in refusing to submit the punitive damages issue to the jury because there was no clear and convincing evidence of malice or gross negligence. Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107, 2003 Miss. LEXIS 135 (Miss. 2003).

Where there was no evidence that a new employer had the intent to harm a former employer by hiring a performer that was under contract, the issue of punitive damages should not have been submitted to the jury in a tortious interference with contractual relations case. Neider v. Franklin, 844 So. 2d 433, 2003 Miss. LEXIS 58 (Miss. 2003).

In a mother's suit against a camp counselor and his employer, based on the mother's claim that her child had been sexually assaulted by the counselor, the trial court properly refused to give a punitive damages instruction; the counselor was not acting within the scope of his employment at the time of the assault, the employer did not benefit from the assault, the jury did not find that the employer knew of the counselor's homosexual tendencies, and a reasonable jury could not find malice, gross neglect, or reckless disregard by the employer. Doe v. Salvation Army, 835 So. 2d 76, 2003 Miss. LEXIS 29 (Miss. 2003).

In the absence of any proof that commercial lenders regularly maintained a system of cross-referencing loans and the bank's prospective purchases, the failure to institute that system was not reckless or gross behavior warranting punitive damages; thus, the award of punitive damages was improper and the Supreme Court reversed and rendered the award. AmSouth Bank v. Gupta, 838 So. 2d 205, 2002 Miss. LEXIS 357 (Miss. 2002).

Remittitur was ordered in a case involving an employer's bad faith failure to pay worker's compensation benefits because the punitive damages awarded were excessive where the evidence did not show that the employer's conduct met the required degree of reprehensibility under Miss. Code Ann. § 11-1-65(1)(a). Miss. Power & Light Co. v. Cook, 832 So. 2d 474, 2002 Miss. LEXIS 399 (Miss. 2002).

In an automobile accident case, plaintiff was not entitled to punitive damages under Miss. Code Ann. § 11-1-65 law where facts showed defendant did not run stop sign, did not fail to check vehicle's speed, tried to take evasive action to avoid accident, had not consumed alcohol, and did not leave the scene of the accident; defendants' conduct did not amount to gross negligence and accordingly, defendants were entitled to partial summary judgment on the issue of punitive damages. Terrell v. W.S. Thomas Trucking, Inc., 2001 U.S. Dist. LEXIS 25455 (N.D. Miss. Mar. 6, 2001).

Beneficiaries of decedent met their burden of proof against tire manufacturer in products liability suit through the testimony of employees of the tire manufacturer who stated that in the course of their many years of employment with the tire manufacturer, they had personal knowledge that bad stock had been used in the manufacture of tires. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

A simple mathematical formula cannot be used to determine whether a punitive damage award is excessive or constitutional. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

Plaintiff in a wrongful death case was not entitled to a jury instruction on punitive damages, as there was no showing of a causal nexus between the defendant's alleged gross negligence and the fatal accident. Choctaw Maid Farms, Inc. v. Hailey, 2001 Miss. LEXIS 302 (Miss. Oct. 31, 2001).

Operating a motor vehicle on a public street while under the influence of intoxicants to the extent that the driver's abilities were substantially impaired demonstrated the kind of gross negligence contemplated in Miss. Code Ann. § 11-1-65(1)(a) (Rev. 1991) and punitive damages were therefore proper. Savage v. Lagrange, 2001 Miss. App. LEXIS 528 (Miss. Ct. App. Dec. 18, 2001).

In an action arising from an accident in which a tractor-trailer rear-ended a tractor, the defendants were entitled to summary judgment on the issue of punitive damages where the plaintiff failed to bring forth any evidence of an action by the defendants that amounted to gross negligence or reckless disregard for others and the defendants brought forth evidence that the truck driver was not under the influence of drugs or alcohol while operating the tractor-trailer. Miller v. Hunt, 2000 U.S. Dist. LEXIS 9924 (N.D. Miss. July 6, 2000).

4. Availability.

After a district court awarded punitive damages based upon evidence of willful and malicious acts of conversion by a bankruptcy debtor, and the bankruptcy court properly gave preclusive effect to its decision and held the debt nondischargeable, the award of punitive damages was also nondischargeable. Blake v. Custom Recycling Servs., — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 148840 (N.D. Miss. Nov. 3, 2015).

Chapter 13 debtor who prevailed in an adversary proceeding she filed against a consumer financial services business and a person who owned the business, on her claim alleging that she could recover title to a mobile home she transferred to the owner because the transfer was constructively fraudulent under 11 U.S.C.S. § 548, was awarded punitive damages, attorney's fees, and costs; although Mississippi law did not favor punitive damages, they were appropriate in this case under Miss. Code Ann. § 11-1-65 because the owner misrepresented the nature of the transaction and did not provide the debtor with complete discovery, and because the debtor was entitled to an award of punitive damages she could also recover her attorney's fees and costs. Nickelson v. Franklin Check Serv., LLC (In re Nickelson), 552 B.R. 149, 2016 Bankr. LEXIS 2310 (Bankr. S.D. Miss. 2016).

In a case in which plaintiff claimed he was terminated for reporting an illegal kickback scheme, the circuit court erred in denying a punitive-damages instruction without conducting an evidentiary hearing to determine whether punitive damages were appropriate. Roop v. Southern Pharms. Corp., 188 So. 3d 1179, 2016 Miss. LEXIS 146 (Miss. 2016).

Chancellor properly declined to award actual damages, punitive damages, or attorney's fees to the owners because the neighbors' conduct was not malicious in any way, they had reason to believe that the restrictive covenants at issue no longer applied, stopped cutting trees upon being served with a restraining order, and the restrictive covenants failed to address the issue of attorney's fees. Robertson v. Catalanotto, 205 So. 3d 666, 2016 Miss. App. LEXIS 52 (Miss. Ct. App. 2016).

When a pharmaceutical provider reported false drug prices to a third party knowing the State of Mississippi would rely on that information to calculate Medicaid reimbursements to pharmacies for those drugs, the State's recovery of punitive damages was properly limited by Miss. Code Ann. § 11-1-65(3)(a) because the statute plainly applied to actions by the State. Sandoz, Inc. v. State (In re Miss. Medicaid Pharm. Average Wholesale Price Litig.), 190 So. 3d 829, 2015 Miss. LEXIS 545 (Miss. 2015).

Tenant was properly awarded punitive damages against landlords, even though the award allegedly exceeded the landlords' net worth, because, inter alia, proof of the landlords' net worth was not a prerequisite. Lang v. Beasley, 159 So. 3d 593, 2014 Miss. App. LEXIS 491 (Miss. Ct. App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 143 (Miss. 2015).

In an asbestos case alleging failure to warn, an award of punitive damages had to be vacated because the trial court's unnecessary comments indicated the trial court considered the jury's compensatory damages award to be inadequate. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

In an asbestos case alleging failure to warn, the issue of punitive damages was properly submitted to a jury because (1) there was evidence that the manufacturer knew the manufacturer's OSHA-compliant warning was inadequate but the manufacturer did nothing to supplement the warning, (2) the jury was adequately instructed on the issue, and (3) a prior release did not address punitive damages. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

Insureds were not entitled to punitive damages, Miss. Code Ann. § 11-1-65(1)(a), regarding an insurer's alleged bad faith delay in paying an uninsured motorist claim because the reason for the delay was the insurer's ongoing investigation concerning causation and evaluation of the claim, and, as such, the insurer had an arguable reason for the delay; the insurer ultimately tendered full payment of the claim. James v. State Farm Mut. Auto., Ins. Co., 2011 U.S. Dist. LEXIS 48845 (S.D. Miss. May 6, 2011), aff'd in part and rev'd in part, 719 F.3d 447, 2013 U.S. App. LEXIS 12816 (5th Cir. Miss. 2013), aff'd in part and rev'd in part, 743 F.3d 65, 2014 U.S. App. LEXIS 1741 (5th Cir. Miss. 2014).

It was undisputed that the trucking company collected payment for all of the work performed by the construction company, that, as a matter of law, the contract was modified to include all of the work performed by the construction company, and that the trucking company blatantly breached its promise to compensate the construction company; moreover, the construction company provided sufficient proof that the trucking company acted in bad faith, with complete disregard for the construction company's rights, seeking to reap the benefits of its contract while at the same time denying its obligations. Based on the evidence, a reasonable juror could find that the trucking company had breached the contract either maliciously, by an intentional wrong, or with reckless disregard for the construction company's rights; therefore, the trial court erred by not submitting the issue of punitive damages to the jury pursuant to Miss. Code Ann. § 11-1-65(1)(c)-(d). T.C.B. Constr. Co. v. W. C. Fore Trucking, Inc., 134 So. 3d 701, 2013 Miss. LEXIS 49 (Miss. 2013).

Insureds were not entitled to punitive damages because an insurer did not breach its contract of insurance or deny coverage in bad faith for two underlying lawsuits. Mitchell v. State Farm Fire & Cas. Co., 799 F. Supp. 2d 680, 2011 U.S. Dist. LEXIS 69777 (N.D. Miss. 2011).

Facts established by the record did not support the imposition of punitive damages becuase the facts known to, or reasonably knowable by defendant prior to the time the borrower was finally deposed, did not support a reasonable finding that defendant lacked a legitimate or arguable reason for its position, or that it had breached its duty to conduct a reasonable investigation. Peoples Bank of the S. v. Bancinsure, Inc., 753 F. Supp. 2d 649, 2010 U.S. Dist. LEXIS 116176 (S.D. Miss. 2010), dismissed, 2011 U.S. Dist. LEXIS 156159 (S.D. Miss. July 7, 2011).

Where punitive damages were not available under Miss. Code Ann. § 11-1-54(1)(a) in a personal injury suit based on a vehicular collision because the driver's conduct amounted to only simple negligence in failing to operate a vehicle in a safe manner and maintain a proper lookout, but it did not constitute willful or wanton disregard for the safety of others, such damages were also unavailable against the driver's employer on a theory of vicarious liability. Dawson v. Burnette, 650 F. Supp. 2d 583, 2009 U.S. Dist. LEXIS 62579 (S.D. Miss. 2009).

Punitive damages were not available under Miss. Code Ann. § 11-1-54(1)(a) in a personal injury suit based on a vehicular collision because defendants' conduct amounted to only simple negligence in failing to operate a vehicle in a safe manner and maintain a proper lookout, but it did not constitute willful or wanton disregard for the safety of others. Dawson v. Burnette, 650 F. Supp. 2d 583, 2009 U.S. Dist. LEXIS 62579 (S.D. Miss. 2009).

Insured was not entitled to punitive damages under Miss. Code Ann. § 11-1-65 for an insurer's alleged bad faith delay in commencing a claims investigation because the terms of the policy at issue required the insured to survive for 180 days after his accident before becoming eligible for disability benefits, and the insurer commenced the investigation at end of the 180-day period, evidencing no willful, wanton, or fraudulent conduct by the insurer. Barnes v. Stonebridge Life Ins. Co., 624 F. Supp. 2d 574, 2009 U.S. Dist. LEXIS 21623 (S.D. Miss. 2009).

In an easement dispute, punitive damages were properly awarded under Miss. Code Ann. § 11-1-65(1)(a) where a commercial property owner removed a sign with a blow torch, engaged in harassment, demanded payment for parking and signage covered under the easement, installed parking bumpers, and erected a fence on neighboring property. Warren v. Derivaux, 996 So. 2d 729, 2008 Miss. LEXIS 590 (Miss. 2008).

Casino patron's Miss Code Ann. § 11-1-65 claim for punitive damages in connection with injuries she allegedly sustained when a cocktail waitress dropped a tray of drinks on or near the patron, while attempting to serve another customer, failed because there was no evidence that the waitress acted with gross negligence when she dropped the tray after the customer unexpectedly and excitedly threw up her hands after winning a poker game. Callender v. Imperial Palace of Miss., LLC, 2008 U.S. Dist. LEXIS 71292 (S.D. Miss. Sept. 19, 2008).

After a guardianship account was drained, the wards prevailed in their suit against the bank for breaching its duty by allowing the funds on deposit to be converted without a court order. Because the evidence established that the bank was not grossly negligent and did not engage in fraud or intentional misconduct, the chancery court erred in awarding punitive damages against the bank under Miss. Code Ann. § 11-1-65. Williams v. Duckett (In re Duckett), 991 So. 2d 1165, 2008 Miss. LEXIS 307 (Miss. 2008).

Under Miss. Code Ann. § 11-1-65, the issue of whether two insureds were entitled to punitive damages should not have been sent to the jury because the insureds did not show that their homeowner's insurer acted with actual malice in processing their claim, and the insurer had an arguable basis for denying the insureds' claim, as evidence showed that the home was destroyed by flooding, a peril that was excluded from coverage; the insurer reasonably relied on a valid and enforceable anti-concurrent causation clause in denying coverage; and the insurer extensively investigated the insureds' claim to determine whether the destruction of the home was caused by flooding or by hurricane winds, which was a covered peril. Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 2008 U.S. App. LEXIS 7419 (5th Cir. Miss. 2008).

Under Miss. Code Ann. § 11-1-65, punitive damages should not have been awarded against a homeowner's insurer in two insureds' suit to recover policy proceeds and damages for bad faith; although the insurer advanced an unsuccessful legal position regarding the allocations of burdens of proof, it was not liable for punitive damages for advancing a legal argument over a disputed issue. Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 2008 U.S. App. LEXIS 7419 (5th Cir. Miss. 2008).

Under Miss. Code Ann. § 11-1-65, punitive damages should not have been awarded against a homeowner's insurer in two insureds' suit to recover policy proceeds and damages for bad faith; although the insurer withheld payment after its expert opined that some of the damage to the insureds' home was caused by wind, a peril that was covered under the policy, the insurer had advanced $ 2,000 to the insureds within 10 days after the destruction of the home, and the insureds had a two percent deductible, the combined sums of which may have been adequate to cover the damages caused by wind. Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 2008 U.S. App. LEXIS 7419 (5th Cir. Miss. 2008).

Employee was not entitled to punitive damages under Miss. Code Ann. § 11-1-65 as to his claim that an insurer and its management company acted in bad faith in waiting four months to approve surgery for the employee's work-related injury because (1) the evidence showed that the employee caused the delay by refusing to release his medical records and by making misstatements about his prior related injuries; (2) the management company was entitled to investigate whether the prior injuries contributed to the current injury for purposes of determining coverage; and (3) the management company did not violate the 48-hour rule in § IV(A)(1) of the Utilization Management Guidelines of the Official Mississippi Uniform Worker's Compensation Fee Schedule because it approved the surgery within 2 days of receiving all of the information necessary to make the coverage decision. McLendon v. Wal-Mart Stores, Inc., 521 F. Supp. 2d 561, 2007 U.S. Dist. LEXIS 81264 (S.D. Miss. 2007).

Lessees were properly awarded punitive damages where the landman stopped production of the well and after only a few months had passed, contrary to the interest of the lease and the lessees' interest, the landman contacted the landowner to negotiate and obtain a new lease for the well, and upon the execution of a new lease the landman resumed production from the well; the lessees claimed that they were never informed that the well was to be shut down by the landman. Gill v. Gipson, 982 So. 2d 415, 2007 Miss. App. LEXIS 520 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 238 (Miss. 2008).

Because an insured failed to prove that she suffered damages as a direct and proximate result of any reasonable reliance on any perceived negligent misrepresentation by an insurer and its agent, she could not prevail on her claim of negligent misrepresentation, nor was she entitled to a jury's award of punitive damages pursuant to Miss. Code Ann. § 11-1-65(c). Horace Mann Life Ins. Co. v. Nunaley, 960 So. 2d 455, 2007 Miss. LEXIS 398 (Miss. 2007).

It was not clear whether the court should have submitted the question of punitive damages to the jury before discovery was completed in a case involving the alleged forgery of a divorcee's signature by her former husband on vehicle lease and purchase agreements since the court could not determine from the summary judgment evidence whether the divorcee had established the elements for an award of punitive damages set forth in Miss. Code Ann. § 11-1-65(1)(d) against the dealership. Dowdy v. Palmer, 2006 U.S. Dist. LEXIS 3176 (S.D. Miss. Jan. 19, 2006).

Because the customer, in his action against the dealership for breach of contract, fraud, and infliction of emotional distress, failed to present evidence of compensatory damages, it was impossible to consider punitive damages under Miss. Code Ann. § 11-1-65. Sumler v. East Ford, Inc., 915 So. 2d 1081, 2005 Miss. App. LEXIS 981 (Miss. Ct. App. 2005).

5. Bifurcated trials.

Tenant was properly awarded punitive damages against landlords because, inter alia, the landlords were not denied an evidentiary hearing, as the record reflected that the landlords had no further evidence to present. Lang v. Beasley, 159 So. 3d 593, 2014 Miss. App. LEXIS 491

(Miss. Ct. App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 143 (Miss. 2015).

In a suit in which two insureds alleged that they were owed proceeds under two property insurance policies and were also seeking punitive damages for the insurer's alleged bad faith and delays in payment, a bifurcated trial was ordered to be held in accordance with Miss. Code Ann. § 11-1-65. Letoha v. Nationwide Mut. Ins. Co., 2008 U.S. Dist. LEXIS 30865 (S.D. Miss. Feb. 28, 2008).

In a case involving a dispute over claimed insurance coverage, the court granted the insurer's request for a bifurcated trial, in accordance with Miss. Code Ann. § 11-1-65, ruling that the issue of punitive damages would be tried separately from other issues in the case, such as coverage, liability, and actual damages. Fowler v. State Farm Fire & Cas. Co., 2008 U.S. Dist. LEXIS 63312 (S.D. Miss. July 25, 2008).

6. Bifurcated claims.

Although a jury ruled in favor of an insured in a dispute over policy proceeds for the loss of the insured's home due to fire, the court did not send the insured's punitive damages claim to the jury as the insured did meet the standard under Miss. Code Ann. § 11-1-65 of showing that the insurer acted with malice, fraud, or gross negligence in denying the claim where the insurer suspected that the insured had committed arson, thus causing the loss of the home. GuideOne Ins. Co. v. Bridges, 2009 U.S. Dist. LEXIS 16035 (S.D. Miss. Mar. 2, 2009).

In insureds' suit asserting claims for breach of insurance policies and bad faith with regard to payment of the insureds' property damage claims related to Hurricane Katrina, bifurcation of the insureds' coverage and punitive damages claims was appropriate under Miss. Code Ann. § 11-1-65; however, because it was difficult to consider the issues of coverage and breach of contract without some information regarding the claims handling process, some evidence about that process would be allowed. Ross v. Metro. Prop. & Cas. Ins. Co., 2008 U.S. Dist. LEXIS 81114 (S.D. Miss. Aug. 25, 2008).

7. Burden of proof.

Chancery court erred by awarding the dominant owner punitive damages without requiring the dominant owner to prove by clear and convincing evidence that the subservient owner's actions were malicious. Muirhead v. Cogan, 158 So. 3d 1259, 2015 Miss. App. LEXIS 121 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion denying a subcontractor's claim for punitive damages because, while the contractor breached the parties' contract by refusing to complete payment to the subcontractor and the contractor's contention that the subcontractor received full payment was legally inaccurate, the subcontractor failed to prove the contractor acted in bad faith or breached its fiduciary duty to the subcontractor. Bar-Til, Inc. v. Superior Asphalt, Inc., 164 So. 3d 1028, 2014 Miss. App. LEXIS 452 (Miss. Ct. App. 2014).

Builder's claim that homeowners' failure to prove some net worth of the builder precluded an award of punitive damage had no merit because the homeowners had no burden to establish that the builder had the financial ability to pay a punitive damage award. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Award of punitive damages was improper because, by instructing the jury that it could award punitive damages pursuant to a preponderance-of-evidence standard, the circuit court's instruction relaxed the necessary burden of proof and in turn, it committed a clear error of law under Miss. Code Ann. § 11-1-65(1)(a). AmFed Cos., LLC v. Jordan, 34 So. 3d 1177, 2009 Miss. App. LEXIS 557 (Miss. Ct. App. 2009).

8. Calculation of net worth.

Because neighbors failed to provide evidence sufficient to enable the trial court to make a determination of their net worth, the trial court was not required to apply the statutory formula based on speculation or guesswork; the neighbors failed to make a full and complete disclosure of their assets in their bankruptcy filings and could have understated the value of their property or other assets. Moore v. McDonald, 210 So. 3d 563, 2017 Miss. App. LEXIS 61 (Miss. Ct. App. 2017).

When a pharmaceutical provider reported false drug prices to a third party knowing the State of Mississippi would rely on that information to calculate Medicaid reimbursements to pharmacies for those drugs, the provider's net worth was properly calculated for purposes of a punitive damages award because the provider's most recent net worth using generally accepted accounting principles was used. Sandoz, Inc. v. State (In re Miss. Medicaid Pharm. Average Wholesale Price Litig.), 190 So. 3d 829, 2015 Miss. LEXIS 545 (Miss. 2015).

9. Attorney's fees.

Town and school district were not entitled to an award of attorney's fees as punitive damages against a county because the court did not find the county's conduct was so extreme and outrageous that the county should bear the expense of litigation. Tunica County v. Town of Tunica, 227 So. 3d 1007, 2017 Miss. LEXIS 179 (Miss. 2017).

RESEARCH REFERENCES

ALR.

Intoxication of automobile driver as basis for awarding punitive damages. 33 A.L.R.5th 303.

Validity of state statutory cap on punitive damages. 103 A.L.R.5th 379.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive. 54 A.L.R.5th 1.

Liability of vendor for food or beverage spilled on customer. 64 A.L.R.5th 205.

Liability of cigarette manufacturers for punitive damages. 108 A.L.R.5th 343.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription – Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072). 109 A.L.R.5th 397.

Recovery of Punitive Damages for Exposure to Asbestos. 24 A.L.R. 6th 497.

See A.L.R. Index to Annotations under Punitive Damages.

Am. Jur.

22 Am. Jur. 2d, Damages §§ 572 et seq. 675, 677-683.

8 Am. Jur. Pl & Pr Forms (Rev), Damages, Forms 111-117, 311-322.

20A Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 291.1 (Complaint, petition, or declaration-Action against manufacturers of asbestos products and distributors of diatomaceous earth – By employee).

23A Am. Jur. Pl & Pr Forms (Rev), Torts, Form 26.1 (Complaint, petition, or declaration – Negligent and intentional disregard for safety causing asbestos poisoning-Individual plaintiff).

CJS.

CJS, Damages §§ 117 et seq. 133, 159, 162(3), 188.

Law Reviews.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part I. 16 Miss. C. L. Rev. 393, Spring, 1996.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, Spring, 1997.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Litigation in Mississippi Today: A Symposium: Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs, 71 Miss. L.J. 395, Winter, 2002.

Litigation in Mississippi Today: A Symposium: Why Mississippi Needs to Pay Attention to National Trends on Punitive Damages, 71 Miss. L.J. 579, Winter, 2002.

Punitive Damages in Mississippi: What Has Happened, What Is Happening and What Is Coming Next, 73 Miss. L.J. 135, Fall, 2003.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

§ 11-1-66. Immunity of premise owners from civil liability in certain circumstances.

No owner, occupant, lessee or managing agent of property shall be liable for the death or injury of an independent contractor or the independent contractor's employees resulting from dangers of which the contractor knew or reasonably should have known.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 4, § 7; Laws, 2004, 1st ex. Sess., ch. 1, § 5, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

Editor's Notes — Laws of 2004, 1st ex. Sess., ch. 1, § 20, provides:

"SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004."

JUDICIAL DECISIONS

ANALYSIS

1.-2. [Reserved for future use.]
3. Independent contractor or employee.
4. No duty to warn.

1.-2. [Reserved for future use.]

3. Independent contractor or employee.

Appellant claimed that the business knew about the oil pits on appellant's property and that knowledge was imputed to appellee, who was an independent contractor; however, while appellant claimed the business's knowledge was undisputed, the testimony suggested otherwise, and appellee testified that there was no indication of the presence of oil pits, and the danger of falling into one did not arise out of and was not connected with the work appellee performed as a delivery driver. Fairley Constr. Servs. v. Savage, 265 So. 3d 203, 2019 Miss. App. LEXIS 61 (Miss. Ct. App. 2019).

Mississippi Court of Appeals declined to extend the limited exception for licensees in Hoffman v. Planters Gin Co., 358 So. 2d 1008 (Miss. 1978), to this statute. Therefore, in a negligence case, a property owner was immune from liability because an independent contractor either knew or should have known of the allegedly dangerous conditions involving a forklift that he had driven for more than a year before a fall; moreover, he knew that the stairs were wet, grimy, and dirty before he fell on them. Tanner v. Roseburg Forest Prods. S., 185 So. 3d 1062, 2016 Miss. App. LEXIS 31 (Miss. Ct. App. 2016).

Operator of a nuclear power plant was entitled to summary judgment on an injured employee's premises liability lawsuit because the operator had no duty to warn an independent contractor and its employee of dangers inherent in the job when the employee for the independent contractor was injured in a fall. McSwain v. Sys. Energy Res., Inc., 97 So. 3d 102, 2012 Miss. App. LEXIS 508 (Miss. Ct. App. 2012).

4. No duty to warn.

In a case in which plaintiffs were injured when they fell to the ground after the scaffolding for the second-story formwork collapsed, the circuit court properly granted summary judgment in favor of the property owner because the property owner had no duty to warn plaintiffs about the condition of the scaffolding as it did not exist at the time that the property owner surrendered control of the property to the general contractor; and the property owner had no control over any aspect of the scaffolding. McKean v. Yates Eng'g Corp., 210 So. 3d 1037, 2015 Miss. App. LEXIS 446 (Miss. Ct. App. 2015), aff'd, 200 So. 3d 431, 2016 Miss. LEXIS 385 (Miss. 2016).

§ 11-1-66.1. Landowners Protection Act; limitation of liability of landowners for certain injuries of invitees injured on landowner's property.

(1) This section shall be known and may be cited as the "Landowners Protection Act."

(2) For any premises-liability actions brought under the laws of the State of Mississippi, no person who owns, leases, operates, maintains, or manages commercial or other real property in the State of Mississippi and no director, officer, employee, agent or independent contractor acting on behalf of any such person shall be civilly liable to any invitee who is injured on said property as the result of the willful, wanton or intentional tortious conduct of any third party who is not a director, officer, employee or agent of the person who owns, leases, operates, maintains or manages such commercial or other real property unless the injured party can prove by a preponderance of the evidence that:

(a) The conduct of said third party occurred on the property;

(b) The conduct of the person who owns, leases, operates, maintains or manages the property actively and affirmatively, with a degree of conscious decision-making, impelled the conduct of said third party; and

(c) The third party's conduct proximately caused the economic and noneconomic damages suffered by the injured party.

(3) For any civil actions brought under the laws of the State of Mississippi for the purpose of alleging liability for the injury of an invitee as described in subsection (2) of this section, an atmosphere of violence shall only be established by similar violent conduct:

(a) Which occurred three (3) or more times within three (3) years before the third party act at issue;

(b) Which took place only on the commercial or other real property where the acts of the third party occurred; and

(c) Which are based upon three (3) or more separate events or incidents that resulted in three (3) or more arraignments of an individual for a felony involving an act of violence.

(4) For any civil actions brought under the laws of the State of Mississippi for the purpose of alleging liability for the injury of an invitee as described in subsection (2) of this section, civil liability may not be based on the prior violent nature of the third party whose acts or omissions proximately caused the claimed injury or damage unless the person who owns, leases, operates, maintains or manages the property has actual, not constructive, knowledge of the prior violent nature of said third party.

(5) If any provision of this section or its application to any person or circumstance is held unconstitutional or otherwise invalid, the remainder of

this section or the application of the provision to other persons or circumstances is not affected.

(6) Nothing in this section shall be construed to alter the provisions of Section 97-3-15.

(7) For purposes of this section, "premises-liability action" means a civil action based upon the duty owed to someone injured on a landowner's premises as a result of conditions or activities on the land.

HISTORY: Laws, 2019, ch. 435, § 1, eff from and after July 1, 2019.

§ 11-1-67. Authority to sue traders in firearms reserved to state.

(1) The authority to bring an action against any firearms or ammunition manufacturer, distributor or dealer duly licensed under federal law on behalf of any governmental entity created by or pursuant to an act of the Mississippi Legislature or the Mississippi Constitution of 1890, or any department, agency or authority thereof, for damages, abatement, injunctive relief or any other relief or remedy resulting from or relating to the lawful design, manufacture, distribution or sale of firearms, firearm components, silencers, ammunition or ammunition components to the public, shall be exclusively reserved to the state. This section shall not prohibit a political subdivision from bringing an action against a firearm or ammunition manufacturer, distributor or dealer for breach of contract or warranty as to firearms or ammunition purchased by the political subdivision, or for injuries resulting from a firearm malfunction due to defects in materials or workmanship.

(2) "Political subdivision" and "governmental entity" shall have the meanings ascribed in Section 11-46-1.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 4, § 9, eff from and after Jan. 1, 2003.

§ 11-1-69. Prohibition of hedonic damages in civil actions.

(1) In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering. The determination of the existence and extent of recovery for pain and suffering and loss of enjoyment of life shall be a question for the finder of fact, subject to appellate review, and the monetary value of the pain and suffering and loss of enjoyment of life shall not be made the subject of expert testimony.

(2) In any wrongful death action, there shall be no recovery for loss of enjoyment of life caused by death.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 4, § 10, eff from and after Jan. 1, 2003.

JUDICIAL DECISIONS

ANALYSIS

1. Damages not hedonistic.
2. Jury instructions.

1. Damages not hedonistic.

In a personal injury products liability lawsuit, an award of damages to the decedent's estate was not inflammatory or in violation of Miss. Code Ann. § 11-1-69(2) because, considering the actual damages and the testimony of the decedent's mother as to the family's loss of society and companionship of a young son and brother on the verge of manhood, and the pain and suffering that he must have experienced between the time of the tire's rupture when he was alive and when the rolling automobile stopped against a tree and he was dead, the jury's award was proper. There was evidence to support the damages, and the jury award to the estate was not based upon hedonic damages. Goodyear Tire & Rubber Co. v. Kirby, 156 So. 3d 281, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. 2009).

2. Jury instructions.

In a beneficiary's wrongful death suit against a doctor, the trial court committed reversible error in instructing the jury that it could consider the "value of life" of the decedent in awarding damages because Miss. Code Ann. § 11-1- 69(2) stated that in any wrongful death action, there would be no recovery for loss of enjoyment of life caused by death. Laney v. Vance, 112 So. 3d 1079, 2013 Miss. LEXIS 171 (Miss. 2013).

RESEARCH REFERENCES

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

§ 11-1-71. Immunity of medical personnel who provide volunteer service in school programs.

(1) Any licensed physician, certified nurse practitioner, psychologist or physician assistant who voluntarily provides needed medical or health services to any program at an accredited school in the state without the expectation of payment shall be immune from liability for any civil action arising out of the provision of such medical or health services provided in good faith on a charitable basis. This section shall not extend immunity to willful acts or gross negligence. Except in cases of rendering emergency care wherein the provisions of Section 73-25-37, Mississippi Code of 1972, apply, immunity under this section shall be extended only if the physician, certified nurse practitioner, psychologist or physician assistant and patient execute a written waiver in advance of the rendering of such medical services specifying that such services are provided without the expectation of payment and that the licensed physician or certified nurse practitioner, psychologist or physician assistant shall be immune as provided herein.

(2) Any physician who voluntarily renders any medical service under a special volunteer medical license authorized under Section 73-25-18 without any payment or compensation or the expectation or promise of any payment or compensation shall be immune from liability for any civil action arising out of

any act or omission resulting from the rendering of the medical service unless the act or omission was the result of the physician's gross negligence or willful misconduct. In order for the immunity under this subsection to apply, there must be a written or oral agreement for the physician to provide a voluntary noncompensated medical service before the rendering of the service by the physician.

HISTORY: Laws, 2002, 3rd Ex Sess, ch. 2, § 11, eff from and after Jan. 1, 2003.

RESEARCH REFERENCES

Law Reviews.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

CHAPTER 3.

PRACTICE AND PROCEDURE IN SUPREME COURT

Sec.
11-3-1. Repealed.
11-3-3. Appeals in some cases returnable at any time.
11-3-5. Appeal not to fail for certain irregularities.
11-3-7. Cases heard at return term; judgment.
11-3-9. No reversal or annulment for want of jurisdiction.
11-3-11. Voluntary dismissal of appeal.
11-3-13. Repealed.
11-3-15. Effect of dismissal.
11-3-17 and 11-3-19. Repealed.
11-3-21. Motion to discharge supersedeas in certain cases.
11-3-23 and 11-3-25. Repealed.
11-3-27. Judgment on bond for supersedeas.
11-3-29. Repealed.
11-3-31. Judgment certified to be enforced.
11-3-33. Bond may be excepted to.
11-3-35. Judgment not to be reversed for certain errors.
11-3-37. Appellant not entitled to reversal for error as to another.
11-3-39. Judgments affirmed in part and reversed in part.
11-3-41. Final judgment to be certified to court below; collection of court costs.
11-3-43. Copy of opinion certified to court below; costs in event of successful appeal.
11-3-45. Repealed.

§ 11-3-1. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hemingway's 1917, § 3182; 1930, § 3371; 1942, § 1955; Laws, 1916, ch. 163]

Editor's Notes — Former § 11-3-1 specified the return days for appeals.

§ 11-3-3. Appeals in some cases returnable at any time.

Appeals from judgments against persons deprived of their liberty in cases of habeas corpus, and from judgment on informations in the nature of quo warranto to try the right to a public office, whether state, district, county, or municipal, and in actions of mandamus where the public interest is concerned, and in cases at law or in chancery involving taxes claimed by the state, county, or municipality, may be returnable before the Supreme Court immediately, without reference to the return days for other appeals; and when the transcript of the record of the case shall be filed in the office of the clerk of the Supreme Court, the appellee having been summoned to appear and answer the appeal, ten days after service of the summons on him or his attorney, the court shall consider such cases as entitled to be heard without regard to the district from which they are brought, and in preference to all civil cases, and they shall be heard and disposed of with all convenient speed.

HISTORY: Codes, 1880, § 1403; 1892, § 4343; 1906, § 4907; Hemingway's 1917, § 3185; 1930, § 3372; 1942, § 1956.

Cross References — Appeal in habeas corpus, see §§ 11-43-53, 11-43-55.

Conclusiveness of judgment in habeas corpus, see § 11-43-43.

Rules governing practice and procedure in appeals to the Supreme Court, see Miss. R. App. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Causes entitled to advancement.
3. Advancement not warranted.

1. In general.

Motion to advance case for hearing in supreme court made by appellee must be overruled where record has been filed in supreme court at instance of appellee, the successful party in lower court, who is not appealing, no bond has been filed by party appealing and time for perfecting appeal has not expired, as there is no right or method whereby successful litigant in lower court, who is not appealing, can prosecute or perfect appeal on behalf of losing party who is taking appeal. Gaudet v. Natchez, 43 So. 2d 900 (Miss. 1950).

Request to advance a cause denied, where its position on the court's docket was such that to advance it would result in its submission, but a short time, if any, earlier than it would be if it should retain its present place on the docket. Garraway v. State, 184 Miss. 466, 184 So. 628, 185 So. 803, 1938 Miss. LEXIS 312 (Miss. 1938).

2. Causes entitled to advancement.

An appeal from a judgment of circuit court upholding reasonableness of ordinance extending city limits may be advanced on the docket since Supreme Court has inherent power to control disposition of cases on its docket with economy of time and effort for itself, for counsel, and for litigants, especially in cases of extraordinary public moment. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151, 1949 Miss. LEXIS 263 (Miss. 1949).

Appeal from orders of board of tax supervisors levying taxes for road building will be advanced. Williams v. Board of Sup'rs, 108 Miss. 746, 67 So. 186, 1914 Miss. LEXIS 268 (Miss. 1914).

Case of public importance to county from which it comes may be advanced on docket whether preference case or not. Weston v. Hancock County, 98 Miss. 800, 54 So. 307, 1910 Miss. LEXIS 126 (Miss. 1910).

3. Advancement not warranted.

Appeal from a judgment of circuit court upholding reasonableness of ordinance extending city limits is not returnable forthwith, but is returnable as any other case, except those specially provided for in this section. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151, 1949 Miss. LEXIS 263 (Miss. 1949).

Separate class of cases to be advanced not created by words "in cases where the public interest is concerned" so as to permit advancement of appeals from orders of supervisors. Williams v. Board of Sup'rs, 108 Miss. 746, 67 So. 186, 1914 Miss. LEXIS 268 (Miss. 1914).

Railroad commission not entitled to advancement of hearing of its appeal from injunction of order against railroad companies. Mississippi R. R. Com. v. Yazoo & M. V. R. Co., 100 Miss. 595, 56 So. 668, 1911 Miss. LEXIS 59 (Miss. 1911).

Suit by attorney-general to forfeit charter of corporation for misuse of its franchise is not a preference case. Jackson Loan & Trust Co. v. State, 96 Miss. 347, 54 So. 157, 1909 Miss. LEXIS 67 (Miss. 1909).

RESEARCH REFERENCES

Am. Jur.
5 Am. Jur. 2d (Rev), Appellate Review § 227.
2 Am. Jur. Pl & Pr Forms, Rev, Appeal and Error, Form 1.1.

CJS.
4 C.J.S., Appeal and Error § 536.

§ 11-3-5. Appeal not to fail for certain irregularities.

An appeal to the Supreme Court shall not be dismissed for want of jurisdiction because of a defect in the application for appeal, or in the bond, or because an insufficient amount was paid to prepay the costs or because of any failure by an officer to comply with the requirements of law in reference to appeals; but all defects and irregularities may be cured by amendment so as to perfect the appeal and obtain the judgment of the Supreme Court in the case; but the court may dismiss an appeal for a failure of the appellant to do, within a reasonable time, what may be necessary to perfect his appeal.

HISTORY: Codes, 1880, § 1407; 1892, § 4347; 1906, § 4913; Hemingway's 1917, § 3189; 1930, § 3375; 1942, § 1959; Laws, 1978, ch. 335, § 2, eff from and after July 1, 1978.

Cross References — Clerk's sending up appeal bond, see § 11-51-73.
Procedures related to tracking system adopted by Supreme Court for all civil and criminal cases, see Miss. R. App. P.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Failure to execute bond.
3. Defective bond.
4. Failure to file record.

1. In general.

Although appellants filed their petition within the forty-five day period required by § 11-51-5 [Repealed], they failed to make a reasonable effort to comply with the requirement of § 11-3-5 of payment of the cost of appeal, where, during a ninety-six day delay, they neither took steps to compel the trial court clerk's compliance with the requirements of § 11-51-61 [Repealed] as to the estimated bill of costs, nor paid the estimated costs until fifty-four days after their knowledge of such costs. Garrett v. Nix, 431 So. 2d 137, 1983 Miss. LEXIS 2599 (Miss.), overruled, Moran v. Necaise, 437 So. 2d 1222, 1983 Miss. LEXIS 2928 (Miss. 1983).

In cases where a petition for appeal is filed and granted by the clerk of the trial court in accordance with §§ 11-51-15 [Repealed], 11-51-51 [Repealed], the appeal is taken when the petition is filed; the provision "if costs be then paid as required" in § 11-51-15 [Repealed] refers to § 11-51-61 [Repealed] rather than § 11-51-25 [Repealed] and therefore does not require prepayment of costs prior to the taking of the appeal. Thus, in the case of appellants who had filed a petition for appeal but had not prepaid the costs of the lower court or the filing fee, a motion to dismiss their appeal for such failure of prepayment would be denied where appellants had requested the clerk of the lower court to prepare an estimate of costs but the clerk had failed to do so and where § 11-3-5 bars dismissal of an appeal to the Supreme Court on the grounds of insufficient prepayment of costs or failure of an officer to comply with the requirements of law. Dixieland Food Stores, Inc. v. Kelly's Big

Star, Inc., 384 So. 2d 1031, 1980 Miss. LEXIS 2011 (Miss. 1980), overruled, Moran v. Necaise, 437 So. 2d 1222, 1983 Miss. LEXIS 2928 (Miss. 1983).

Appellant was granted leave to file an amended appeal bond after the expiration of the 45-day period set by § 11-51-5 [Repealed] for filing of such bonds where the original bond had been timely filed and in the correct amount and where the purpose of the amendment was to add an obligee on the bond. Clow Corp. v. J. D. Mullican, Inc., 336 So. 2d 1327, 1976 Miss. LEXIS 1570 (Miss. 1976).

Any prematurity in filing notice of appeal with the court reporter was cured by the entering of a final judgment, the proper disposition of pending motions, and the filing and approval of an appeal bond. First Nat'l Bank v. Cutrer, 190 So. 2d 883, 1966 Miss. LEXIS 1417 (Miss. 1966).

The court should not strike a transcript of the testimony for purely technical reasons where there has been no prejudice to the opposite party. First Nat'l Bank v. Cutrer, 190 So. 2d 883, 1966 Miss. LEXIS 1417 (Miss. 1966).

Where the circuit court, upon appeal, reviewed the case upon a record made in the county court, the contention of appellant, who undertook an appeal to the Supreme Court and deposited $100.00 in cash with the circuit clerk in lieu of a bond, that "the cost of the transcript" meant solely the cost in the circuit court and did not include the cost previously accrued in the county court was rejected, since the quoted term meant the transcript upon which the appellant relied for his appeal, including the stenographer's notes of the testimony in county court, as well as other costs accrued in the appeal to the circuit court. Walters v. Fine, 232 Miss. 494, 95 So. 2d 229, 1957 Miss. LEXIS 485 (Miss. 1957).

This section [Code 1942, § 1959] applies only to appeals to the Supreme Court of the state. Watson v. Holifield, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

This statute is broad in its terms and its application should not be limited to trivial defects and irregularities. Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the Supreme Court, but it is within the power and discretion of the Supreme Court to permit bond to be executed on such terms and conditions as the court may deem proper. Sabougla Drainage Dist. v. People's Bank & Trust Co., 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

Rights already lost and wrongs already perpetrated cannot be corrected by mandamus. Lockard v. Hoye, 113 Miss. 238, 74 So. 137, 1916 Miss. LEXIS 38 (Miss. 1916).

A party will be permitted to amend in all cases so as to perfect his appeal. State ex rel. Attorney Gen. v. Board of Sup'rs, 64 Miss. 358, 1 So. 501, 1886 Miss. LEXIS 73 (Miss. 1886).

2. Failure to execute bond.

The perfection of an appeal to the Supreme Court within the time allowed by statute is jurisdictional, and an appeal within the meaning of the statute is taken when, but not until, a bond therefor is filed and approved where such bond is required. Fisher v. Crowe, 289 So. 2d 921, 1974 Miss. LEXIS 1694 (Miss. 1974).

Where a justice of the peace who presided over a special court of eminent domain had before him a petition for an appeal to the circuit court and had accepted $300 cash, the correct amount of the cost bond, and had issued a receipt reciting that the money was received as an appeal bond, the appellants would be permitted to cure the defect in the bond by filing the statutory bond with two sureties, since the reason for giving the bond and having securities thereon is to secure the payment of costs, and the deposit of cash while not meeting the requirements of the statute, unquestionably satisfied that purpose. Jefferson v. Mississippi State Highway Com., 254 So. 2d 181, 1971 Miss. LEXIS 1247 (Miss. 1971).

This section applying only to appeals to the Supreme Court, did not authorize the court, on a habeas corpus trial held after the time had expired for appealing from contempt judgments, to permit a sheriff to file bond at that time and perfect an appeal. Watson v. Holifield, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Where trial court fixed the bond at $1000 for an appeal without supersedeas and the appellant filed a petition for appeal and recited therein that he was depositing with the clerk the sum of $1000 as security for costs and the cost of transcript was not prepaid, this cash deposit did follow the statutory requirement, but the appellant was given seven days to file good and sufficient bond with proper sureties. Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

Where bank appeals without necessary bond courts may permit it to supply bond. Cleveland State Bank v. Cotton Exchange Bank, 118 Miss. 768, 79 So. 810, 1918 Miss. LEXIS 104 (Miss. 1918).

Appeal dismissed where no bond filed with record on appeal from justice to the circuit court. Gaines v. State, 48 So. 182 (Miss. 1909).

Where the appellant failed to execute a bond, he may be permitted to supply the same, so as to perfect the appeal. Hudson v. Gray, 58 Miss. 589, 1881 Miss. LEXIS 3 (Miss. 1881).

3. Defective bond.

In view of Code [1942] § 1163, requiring two or more sufficient resident sureties, one appealing from a decree of the chancery court who filed an appeal bond with only one individual surety would be given 30 days to file a sufficient bond, and if he should fail to do so, his appeal would be dismissed. Hatten v. Pearson, 221 So. 2d 87, 1969 Miss. LEXIS 1487 (Miss. 1969).

Where an appeal bond is filed with only one surety the Supreme Court may grant leave to perfect the defective appeal bond after the expiration of the time for taking an appeal. Lipson v. Lipson, 183 So. 2d 900, 1966 Miss. LEXIS 1450 (Miss. 1966).

Defect in appeal bond given in appeal from municipal ordinance to Circuit Court, in that it was signed only by the protestants as principals, and without the two sureties required by law, was waived by failure to object thereto in the circuit court; and, bond being amenable, defect did not deprive either the circuit court or supreme court of jurisdiction. Neely v. Charleston, 35 So. 2d 316 (Miss. 1948).

Appellees held not entitled to dismissal of appeal for defect in appellants' bond which was not signed by surety, since all defects in appeal bonds may be cured by amendment, and appellants could substitute proper bond, as requested. Gericevich v. Bonham, 177 Miss. 423, 170 So. 680, 1936 Miss. LEXIS 251 (Miss. 1936).

Motion to dismiss defective appeal bond will be overruled and request to substitute new bond granted. Lovett v. Harrison, 162 Miss. 814, 137 So. 471, 1931 Miss. LEXIS 102 (Miss. 1931).

Leave may be granted to perfect defective appeal bond after expiration of time allowed for taking appeal. Lovett v. Harrison, 162 Miss. 814, 137 So. 471, 1931 Miss. LEXIS 102 (Miss. 1931).

Appellant filing defective appeal bond, in that it had only one surety, was granted ten days to supply proper bond. Purity Ice Cream Co. v. Morton, 157 Miss. 728, 127 So. 276, 1930 Miss. LEXIS 250 (Miss. 1930).

4. Failure to file record.

The authority of the Supreme Court to promulgate rules of procedure in aid of its appellate jurisdiction includes the power to issue writs of certiorari to court reporters requiring the preparation and filing of transcripts of testimony in cases appealed to the court. Brown v. Water Valley, 319 So. 2d 649, 1975 Miss. LEXIS 1481 (Miss. 1975).

Clerk of trial court not excused for failure to file record in Supreme Court seasonably after expiration of time for filing transcript of evidence, by fact that stenographer failed to file such transcript. Yazoo & M. V. R. Co. v. McGraw, 118 Miss. 850, 80 So. 331, 1918 Miss. LEXIS 137 (Miss. 1918).

RESEARCH REFERENCES

Am. Jur.
5 Am. Jur. 2d, Appellate Review §§ 706, 707.

CJS.
5 C.J.S., Appeal and Error §§ 879 et seq.

Law Reviews.
1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-3-7. Cases heard at return term; judgment.

In case the judgment, sentence or decree of the court below be reversed, the Supreme Court shall render such judgment, sentence or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law in the absence of such directions.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (10); 1857, ch. 63, art. 11; 1871, § 413; 1880, § 1415; 1892, § 4353; 1906, § 4919; Hemingway's 1917, § 3195; 1930, § 3378; 1942, § 1962; Laws, 1991, ch. 573, § 14, eff from and after July 1, 1991.

Cross References — Continuance of appeal where counsel is legislator, see § 11-1-9.

Limitation for new action after reversal on appeal, see § 15-1-69.

Periods of time for filing unaffected by expiration of term of court, see Miss. R. App. P. 26.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Procedure in Supreme Court.
3. Disposition of appeal in general.
4. —Reversal and entry of proper judgment.
5. —Particular cases.
6. —Reversal and award of new trial.
7. —Reversal and dismissal of action.
8. —Affirmance.
9. —Remand.
10. Scope and effect of judgment of Supreme Court.
11. Recovery of costs.

1. In general.

Contempt for failure to obey judgment should be punished by court rendering such judgment. Ganong v. Jonestown, 98 Miss. 265, 53 So. 594, 1910 Miss. LEXIS 60 (Miss. 1910).

2. Procedure in Supreme Court.

The Supreme Court, in reversing dismissal on other grounds of statutory proceeding in which statute's constitutionality was questioned, should, where no matter of fact is to be ascertained, no damages to be assessed, and no uncertainty in the matter to be determined, pass on the constitutionality of the statute. State ex rel. Patterson v. Bd. of Supervisors, 234 Miss. 26, 105 So. 2d 154, 1958 Miss. LEXIS 457 (Miss. 1958).

If demurrer to declaration because stating no cause of action, and defendant's objections to evidence and request for peremptory instruction are overruled, first inquiry on defendant's appeal from adverse judgment is whether declaration is sufficient. Newell Contracting Co. v. Flynt, 172 Miss. 730, 161 So. 743 (Miss. 1935).

Where defendant, instead of demurring to declaration because stating no cause of action, pleads thereto and unsuccessfully objects to evidence overrunning declaration and moves for peremptory instruction, first question on defendant's appeal from adverse judgment is whether declaration is sufficient. Newell Contracting Co. v. Flynt, 172 Miss. 730, 161 So. 743 (Miss. 1935).

On appeal from judgment of chancellor reinstating disbarred attorney, trial is not de novo, but review is on record with right to require additional evidence, if necessary. Ex parte Marshall, 165 Miss. 523, 147 So. 791, 1933 Miss. LEXIS 314 (Miss. 1933).

3. Disposition of appeal in general.

Holding that the omission of the range number from the description appearing in a deed was a mere scrivener's error, the Supreme Court, under authority of Code 1942, § 1962, entered a decree reforming the instrument by inserting therein the range number intended by the parties. Sunnybrook Children's Home, Inc. v. Dahlem, 265 So. 2d 921, 1972 Miss. LEXIS 1381 (Miss. 1972).

Supreme Court reversing circuit court judgment reversing county court judgment cannot render summary judgment on appeal bond carrying case from county to circuit court. Federal Credit Co. v. Zepernick Grocery Co., 153 Miss. 498, 121 So. 858, 1929 Miss. LEXIS 95 (Miss. 1929).

4. —Reversal and entry of proper judgment.

Supreme Court, reversing circuit court's judgment which reversed county court's judgment, could render such judgment as circuit court should have rendered. Ellis v. S. Pellegrini, Inc., 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

On reversal, if judgment to be rendered appears certain, case will not be remanded for new trial, but Supreme Court will render final judgment. Witherspoon v. State, 138 Miss. 310, 103 So. 134, 1925 Miss. LEXIS 55 (Miss. 1925).

On reversal, where record presents nothing for jury, judgment will be rendered for appellant. Hines v. Cole, 123 Miss. 254, 85 So. 199, 1920 Miss. LEXIS 27 (Miss. 1920).

On reversing erroneous judgment Supreme Court will render proper judgment if facts are undisputed. Hairston v. Montgomery, 102 Miss. 364, 59 So. 793, 1912 Miss. LEXIS 65 (Miss. 1912).

5. —Particular cases.

Where a judgment or decree rendered by a chancellor is clearly excessive and all the facts are found by the chancellor, and the amount of the judgment is based on facts and opinions of witnesses as to value, the Supreme Court will, on reversing the decree, render judgment for the proper amount without remanding the cause to the court below. Estate of Collins v. Dunn, 233 Miss. 636, 103 So. 2d 425, 1958 Miss. LEXIS 426 (Miss. 1958).

Where defendant in prosecution in county court for unlawful possession of whisky was entitled to a directed verdict of not guilty, and circuit court should have reversed judgment of conviction and discharged defendant, Supreme Court would reverse judgment of circuit court affirming conviction and would discharge defendant. Lewis v. State, 198 Miss. 767, 23 So. 2d 401, 1945 Miss. LEXIS 245 (Miss. 1945).

Where the proof in a grand larceny prosecution showed that the stolen cattle were taken in Tallahatchie County and were taken from the possession of the defendants in Coahoma County, without having passed through Grenada County, in which the indictment alleged the offense to have been committed, the trial court should have sustained defendant's motion that venue was not proved in Grenada County; and the Supreme Court would render the judgment which the court below should have rendered by discharging the defendants from the present indictment, but holding them under their appearance bond to await the action of the next grand jury of the appropriate county.

Whitten v. State, 189 Miss. 809, 199 So. 74, 1940 Miss. LEXIS 167 (Miss. 1940).

Where on suggestion of error after judgment of reversal in the Supreme Court, holding that the court below should have granted the plaintiff's peremptory instruction to find for it in the amount of the deficiency claimed, with interest, after mortgage foreclosure, together with reasonable attorneys' fees, plaintiff filed a remittitur of the attorney's fee in due time, and the opinion of the Supreme Court clearly announced that the court below should have entered a judgment for the amount of the debt with interest, the Supreme Court had authority under this section to enter such judgment as the court below should have entered. Home Owners Loan Corp. v. Wiggins, 188 Miss. 750, 195 So. 339, 1940 Miss. LEXIS 52 (Miss. 1940).

Where description of mortgaged property was void because insufficient and record presented no other facts for jury's determination which could affect right of purchaser at bankruptcy sale to recover, Supreme Court reversed judgment for mortgagee and entered final judgment for such purchaser. National Foods, Inc. v. Friedrich, 173 Miss. 717, 163 So. 126, 1935 Miss. LEXIS 248 (Miss. 1935).

Where chancellor finds all facts, Supreme Court reversing decree as to damages will render judgment for proper amount. Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874, 1927 Miss. LEXIS 280 (Miss. 1927).

Supreme Court, on reversing judgment for injury on ground that appellant was entitled to directed verdict, will render judgment for appellant, notwithstanding material evidence was excluded, where appellee consented thereto and failed to make application for continuance to procure alleged material witnesses. Hattiesburg Chero Cola Bottling Co. v. Price, 143 Miss. 14, 108 So. 291, 1926 Miss. LEXIS 239 (Miss. 1926).

Where judgment below is illegal Supreme Court may impose sentence in proper form. Thompson v. State, 124 Miss. 463, 86 So. 871, 1920 Miss. LEXIS 530 (Miss. 1920).

Where defendant entitled to peremptory instruction, Supreme Court on reversing judgment for plaintiff will render judgment for defendant. Yazoo & M. R. Co. v. Pope, 104 Miss. 339, 61 So. 450, 1913 Miss. LEXIS 46 (Miss. 1913).

Supreme Court, on appeal from judgment improperly refusing mandamus, will not remand case but will render judgment requiring election commissioners to meet and canvass returns made by managers of election. State ex rel. Hudson v. Pigott, 97 Miss. 599, 54 So. 257 (Miss. 1910).

6. —Reversal and award of new trial.

Supreme Court may award new trial on issue of damages only. Yazoo & M. V. R. Co. v. Scott, 108 Miss. 871, 67 So. 491, 1914 Miss. LEXIS 287 (Miss. 1914).

7. —Reversal and dismissal of action.

On reversal the cause is properly dismissed where there is nothing to be determined by the lower court and no action is maintainable in any court. Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 104 Miss. 636, 61 So. 310, 1913 Miss. LEXIS 28 (Miss. 1913).

8. —Affirmance.

In a proceeding to set aside a will and to have title to deceased's property vested in plaintiffs, or to obtain reasonable compensation for services rendered to deceased, which was done allegedly pursuant to an agreement by deceased to devise his property to plaintiffs for living with and caring for him, where the evidence was sufficient to support the chancellor's finding that some additional compensation should be allowed the plaintiffs but the amount allowed was clearly excessive, the Supreme Court modified the decree of the lower court so as to reduce the amount of the allowance, and the decree, as modified, was affirmed. Estate of Collins v. Dunn, 233 Miss. 636, 103 So. 2d 425, 1958 Miss. LEXIS 426 (Miss. 1958).

In absence of cross-appeal and appellee's declaration failing to demand full amount sheriff could have successfully sued for as fees for serving overseers' commissions, Supreme Court cannot increase judgment, but will affirm judgment recovered. Forrest County v. Thompson, 204 Miss. 628, 37 So. 2d 787, 1948 Miss. LEXIS 395 (Miss. 1948).

Where the court of original jurisdiction rendered a judgment on the merits of a case on specific grounds, declining to pass on other grounds duly presented, the Supreme Court may, nevertheless, affirm on the grounds not passed on. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 So. 937, 1902 Miss. LEXIS 132 (Miss. 1902).

9. —Remand.

Where language contained in the opinion of the circuit judge left the matter to be determined by the Supreme Court uncertain, the cause was remanded to the circuit court. Biglane Operating Co. v. Brown, 322 So. 2d 470, 1975 Miss. LEXIS 1546 (Miss. 1975).

In action for damages for fraud and deceit in connection with representations by seller as to cultivatable protected acreage in tract of land sold, Supreme Court will remand case to trial court for taking of testimony upon question of amount of cultivatable land within protection of levee and amount of damages sustained by purchaser as consequence of misrepresentation when Supreme Court is unable to render judgment for reason that it cannot calculate amount with sufficient certainty. Reed v. Charping, 207 Miss. 1, 41 So. 2d 11, 1949 Miss. LEXIS 312 (Miss. 1949).

Case will be remanded where lower court makes no finding on one of two points in case, though its decision on the other be erroneous. Edwards v. Kingston Lumber Co., 92 Miss. 598, 46 So. 69, 1908 Miss. LEXIS 207 (Miss. 1908).

Where trial court failed to adjudicate amount due in suit to restrain foreclosure of mortgage, proper amount could not be decreed on appeal. Gray v. Bryson, 87 Miss. 304, 39 So. 694, 1905 Miss. LEXIS 134 (Miss. 1905).

10. Scope and effect of judgment of Supreme Court.

Judgment on appeal conclusive as to case presented but not new case made by amendment of bill introducing new matter supported by new evidence. Haines v. Haines, 98 Miss. 830, 54 So. 433, 1910 Miss. LEXIS 131 (Miss. 1910).

11. Recovery of costs.

Where judgment for plaintiff was reversed in part and Supreme Court rendered judgment which trial court should have rendered, defendant was "successful party" entitled to full costs on appeal. Aetna Life Ins. Co. v. Thomas, 166 Miss. 53, 144 So. 50, 1932 Miss. LEXIS 306 (Miss. 1932).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 670, 671 et seq.

CJS.

5 C.J.S., Appeal and Error §§ 1238 et seq., 1249 et seq.

Law Reviews.

1982 Mississippi Supreme Court Review: Civil Procedure: Judicial Decisions. 53 Miss LJ 130, March 1983.

§ 11-3-9. No reversal or annulment for want of jurisdiction.

A judgment or decree in any chancery or circuit court rendered in a civil case, shall not be reversed or annulled on account of want of jurisdiction to render the judgment or decree.

HISTORY: Codes, 1892, § 4354; 1906, § 4920; Hemingway's 1917, § 3196; 1930, § 3380; 1942, § 1964.

Editor's Notes — This section is the counterpart of § 147, Constitution 1890. The cases annotated under that section of the constitution are applicable to this section of the code and are referred to in connection with it.

Cross References — Constitutional prohibition against reversing judgment for want of jurisdiction, see Miss. Const. Art. 6, § 147.

Jurisdiction of chancery court in general, see § 9-5-81.

Jurisdiction of circuit court generally, see §§ 9-7-81 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Error of jurisdiction as between equity and law.
3. —In chancery courts.
4. —In law courts.
5. —Transfer of causes.
6. Other errors.

1. In general.

Supreme Court will not reverse in doubtful case where court had jurisdiction of parties because suit brought in wrong court. Metzger v. Joseph, 111 Miss. 385, 71 So. 645, 1916 Miss. LEXIS 309 (Miss. 1916).

Supreme Court will not reverse simply because suit brought in wrong court. White v. Willis, 111 Miss. 417, 71 So. 737, 1916 Miss. LEXIS 313 (Miss. 1916); W. W. Walley & Son v. L. N. Dantzler Co., 114 Miss. 601, 75 So. 433, 1917 Miss. LEXIS 65 (Miss. 1917).

Question of jurisdiction must be raised in trial court. Hawkins v. Scottish Union & Nat'l Ins. Co., 110 Miss. 23, 69 So. 710, 1915 Miss. LEXIS 10 (Miss. 1915); Indianola Compress & Storage Co. v. Southern R. Co., 110 Miss. 602, 70 So. 703, 1915 Miss. LEXIS 88 (Miss. 1915).

Section 147, Constitution 1890, is not applicable where court below declined jurisdiction. McCracken v. Lewis, 89 Miss. 229, 42 So. 671 (Miss. 1906); Mitchell v. Bank of Indianola, 98 Miss. 658, 54 So. 87, 1910 Miss. LEXIS 107 (Miss. 1910); Murphy v. Meridian, 103 Miss. 110, 60 So. 48, 1912 Miss. LEXIS 143 (Miss. 1912).

This section [Code 1942, § 1964] deprives the Supreme Court alone of power; a chancery court may rightfully dismiss a cause the jurisdiction of which properly belongs to a court of law. Carbolineum Wood-Preserving & Mfg. Co. v. Meyer, 76 Miss. 586, 25 So. 297, 1898 Miss. LEXIS 138 (Miss. 1898).

This section [Code 1942, § 1964] exempts decrees in chancery and judgments of the circuit court from collateral attack on the ground of want of jurisdiction as between equity and common law. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33, 1894 Miss. LEXIS 4 (Miss. 1894).

The prohibition of the section [Code 1942, § 1964] is not confined to final judgments or decrees, but applies also to appeals from interlocutory ones where the question of jurisdiction is directly raised. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32, 1893 Miss. LEXIS 47 (Miss. 1893).

2. Error of jurisdiction as between equity and law.

Decree overruling demurrer to bill seeking damages for breach of contract not reversed, though action should have been at law. Dinsmore v. Hardison, 111 Miss. 313, 71 So. 567, 1916 Miss. LEXIS 295 (Miss. 1916); Metzger v. Joseph, 111 Miss. 385, 71 So. 645, 1916 Miss. LEXIS 309 (Miss. 1916).

Under this section [Code 1942, § 1964] a personal judgment against the members of a firm for a firm debt rendered in a suit to set aside alleged fraudulent conveyances by them does not constitute reversible error. Holmes Bros. v. Ferguson-McKinney Dry Goods Co., 86 Miss. 782, 39 So. 70, 1905 Miss. LEXIS 97 (Miss. 1905).

In an action in equity for foreclosure of mortgage and recovery of the debt, the fact that there was a defense to the foreclosure action did not preclude court of equity from giving a recovery for the money claimed, although based upon a purely legal right. Atkinson v. Felder, 78 Miss. 83, 29 So. 767, 1900 Miss. LEXIS 175 (Miss. 1900).

3. —In chancery courts.

The chancery court, upon dismissal of attachment against nonresident, still had jurisdiction to render a personal decree against the nonresident. Myers v. Giroir, 226 Miss. 335, 84 So. 2d 525, 1956 Miss. LEXIS 404 (Miss. 1956).

Decree of chancery court imposing penalty for violation of anti-trust law will not be reversed. Grenada Lumber Co. v. State, 98 Miss. 536, 54 So. 8, 1910 Miss. LEXIS 92 (Miss. 1910); Dukate v. Adams, 101 Miss. 433, 58 So. 475, 1912 Miss. LEXIS 12 (Miss. 1912).

In action in assumpsit in chancery court, decree overruling demurrer on ground of jurisdiction cannot be reversed by Supreme Court. Town of Woodville v. Jenks, 94 Miss. 210, 48 So. 620, 1908 Miss. LEXIS 48 (Miss. 1908).

Decree in chancery cannot be reversed for error as to whether cause was of equity or common law jurisdiction. Mississippi Fire Ass'n v. Stein, 88 Miss. 499, 41 So. 66, 1906 Miss. LEXIS 168 (Miss. 1906).

A decree in chancery will not be reversed on the ground merely that there was an adequate remedy at law. Hancock v. Dodge, 85 Miss. 228, 37 So. 711, 1904 Miss. LEXIS 121 (Miss. 1904); Decell v. Hazlehurst Oil Mill & Fertilizer Co., 83 Miss. 346, 35 So. 761, 1903 Miss. LEXIS 50 (Miss. 1903); Thompson v. Hill, 152 Miss. 390, 119 So. 320, 1928 Miss. LEXIS 265 (Miss. 1928).

When a court of equity has taken jurisdiction of a proceeding to compel an agent to account for misappropriation of funds, its decree will not be disturbed on appeal on the grounds that the complainant had a complete remedy at law. Decell v. Hazlehurst Oil Mill & Fertilizer Co., 83 Miss. 346, 35 So. 761, 1903 Miss. LEXIS 50 (Miss. 1903).

If a chancery court overrule a demurrer to a cross bill, the Supreme Court cannot, under the section [Code 1942, § 1964], reverse the decree because of any error or mistake as to whether the matters therein propounded be of equity or common law jurisdiction. Irion v. Cole, 78 Miss. 132, 28 So. 803, 1900 Miss. LEXIS 80 (Miss. 1900).

If the chancery court overrule a demurrer to a bill, raising the question of its jurisdiction to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the Supreme Court cannot, under the section [Code 1942, § 1964], review such question, there being no other error found in the record. Day v. Hartman, 74 Miss. 489, 21 So. 302, 1896 Miss. LEXIS 172 (Miss. 1896).

Where a chancery court entertains jurisdiction of a case, the question whether it were or were not equitable in character does not arise, by virtue of the section [Code 1942, § 1964], in the Supreme Court. Adams v. Capital State Bank, 74 Miss. 307, 20 So. 881, 1896 Miss. LEXIS 130 (Miss. 1896).

If the chancery court erroneously assume jurisdiction of an action of trespass the Supreme Court is powerless to interfere. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32, 1893 Miss. LEXIS 47 (Miss. 1893).

In action by creditor to set aside a fraudulent sale of goods against debtor and purchaser of goods, wherein creditor obtained attachment of purchaser's real estate, under this section [Code 1942, § 1964] no error could be assigned that chancery court was without jurisdiction. Barrett v. Carter, 69 Miss. 593, 13 So. 625, 1891 Miss. LEXIS 137 (Miss. 1891).

4. —In law courts.

The circuit court having entertained jurisdiction of an action of ejectment, the Supreme Court cannot because of the section [Code 1942, § 1964] reverse its judgment, even if, by § 160 of the Constitution, the remedy in the particular case should have been sought in the chancery court. Illinois C. R. Co. v. Le Blanc, 74 Miss. 650, 21 So. 760, 1897 Miss. LEXIS 57 (Miss. 1897).

A judgment of the circuit court in favor of a claimant will not, under the section [Code 1942, § 1964], be reversed because his title was only an equitable one. Goyer Cold-Storage Co. v. Wildberger, 71 Miss. 438, 15 So. 235, 1893 Miss. LEXIS 92 (Miss. 1893).

5. —Transfer of causes.

Order of chancellor sustaining demurrers to bill and ordering transfer to circuit court is appealable. Robertson v. F. Goodman Dry Goods Co., 115 Miss. 210, 76 So. 149, 1917 Miss. LEXIS 203 (Miss. 1917).

Supreme Court cannot transfer case from chancery to circuit court. Town of Woodville v. Jenks, 94 Miss. 210, 48 So. 620, 1908 Miss. LEXIS 48 (Miss. 1908).

6. Other errors.

Where original bill unsustainable for

failure to show equity jurisdiction, cross bills were also unsustainable, but error of court assuming jurisdiction is not within Const. 1890 § 147. Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 103 Miss. 816, 60 So. 1010, 1912 Miss. LEXIS 234 (Miss. 1912), modified, 104 Miss. 636, 61 So. 310, 1913 Miss. LEXIS 28 (Miss. 1913); Hawkins v. Scottish Union & Nat'l Ins. Co., 110 Miss. 23, 69 So. 710, 1915 Miss. LEXIS 10 (Miss. 1915); Indianola Compress & Storage Co. v. Southern R. Co., 110 Miss. 602, 70 So. 703, 1915 Miss. LEXIS 88 (Miss. 1915).

Dismissal of cause in chancery when transfer to circuit court proper, not within this section. Murphy v. Meridian, 103 Miss. 110, 60 So. 48, 1912 Miss. LEXIS 143 (Miss. 1912).

Error of chancellor in overruling demurrer to bill bad for misjoinder is not mistake as to equity or law jurisdiction. Newton Oil & Mfg. Co. v. Sessums, 102 Miss. 181, 59 So. 9 (Miss. 1912).

This section does not apply to cases in which either the circuit or chancery court entertains a cause, being neither of equity nor common-law jurisdiction, of which it has no jurisdiction. Board of Levee Comm'rs v. Brooks, 76 Miss. 635, 25 So. 358, 1898 Miss. LEXIS 143 (Miss. 1898).

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, instead of remanding the cause to the court having jurisdiction, the Supreme Court will dismiss it if it appears that the complainant has no cause of action. Griffin v. Byrd, 74 Miss. 32, 19 So. 717, 1896 Miss. LEXIS 95 (Miss. 1896).

The section is not applicable to a decree appointing a receiver, void because made on the ex parte application of a debtor, such unauthorized proceeding not being a "cause" within its meaning. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33, 1894 Miss. LEXIS 4 (Miss. 1894).

The Supreme Court is not precluded by the section from reversing a decree enjoining a number of actions for the destruction of property by fire on the idea of preventing a multiplicity of suits, the question in such case being merely as to the power of any court to join the parties in one suit. Tribbette v. Illinois C. R. Co., 70 Miss. 182, 12 So. 32, 1892 Miss. LEXIS 87 (Miss. 1892).

RESEARCH REFERENCES

ALR.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure. 59 A.L.R. Fed. 831.

§ 11-3-11. Voluntary dismissal of appeal.

If an appellant shall voluntarily dismiss his appeal after the transcript of the record has been filed in the Supreme Court, he shall be liable to judgment by said court as in case of an affirmance of the judgment or decree.

HISTORY: Codes, 1880, § 1429; 1892, § 4366; 1906, § 4932; Hemingway's 1917, § 3208; 1930, § 3381; 1942, § 1965.

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 711, 714, 716.

2 Am. Jur. Pl & Pr Forms, Rev, Appeal and Error, Forms 1096, 1097.

CJS.

5 C.J.S., Appeal and Error § 878.

§ 11-3-13. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (10); 1857, ch. 63, art. 16; 1871, § 418; 1880, § 1416; 1892, § 4355; 1906, § 4921; Hemingway's 1917, § 3197; 1930, § 3382; 1942, § 1966]

Editor's Notes — Former § 11-3-13 provided for the dismissal of an appeal where the record was not filed on or before the return day, and for reinstatement of an appeal after dismissal.

§ 11-3-15. Effect of dismissal.

After the dismissal of an appeal or supersedeas by the Supreme Court, another appeal or supersedeas shall not be granted in the same cause, so as to bring it again before the court.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (33); 1857, ch. 63, art. 17; 1871, § 419; 1880, § 1417; 1892, § 4356; 1906, § 4922; Hemingway's 1917, § 3198; 1930, § 3383; 1942, § 1967.

Cross References — Effect of affirmance or dismissal of appeal on relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.

1. In general.

Where an appeal has been perfected and dismissed for want of prosecution, a subsequent appeal or writ of error is barred by this section. First American Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481, 1978 Miss. LEXIS 2368 (Miss. 1978).

Prior appeal by the attorney general, as a mere interloper, from order of the tax commission, does not bar a subsequent authorized appeal by him. Board of Sup'rs v. Guaranty Loan, Trust & Banking Co., 118 Miss. 600, 79 So. 802, 1918 Miss. LEXIS 102 (Miss. 1918).

A dismissal of an appeal because premature will not bar another from a final judgment in the same cause. Stokes v. Shannon, 55 Miss. 583, 1878 Miss. LEXIS 15 (Miss. 1878).

The statute does not apply where the dismissal is without the fault of the party, or for an irregularity over which he had no control. Bull v. Harrell, 8 Miss. 9, 1843 Miss. LEXIS 51 (Miss. 1843); Sherman v. Lovejoy, 30 Miss. 105, 1855 Miss. LEXIS 67 (Miss. 1855).

2. Applicability.

In a case in which (1) 29 days after the judgment of divorce was entered, the husband filed a timely notice of appeal and the appeal was ultimately dismissed for want of prosecution after he failed to file a timely brief; (2) the husband filed a motion in the chancery court to aside, alter, or amend the judgment of divorce; (3) the chancery court denied the motion; and (4) the husband appealed that decision, the wife unsuccessfully argued that appellate jurisdiction was precluded under Miss. Code Ann. § 11-3-15. The present appeal was not a successive appeal from the judgment of divorce; it arose from the husband's motion to set aside the judgment of divorce as void. Cobb v. Cobb, 29 So. 3d 145, 2010 Miss. App. LEXIS 118 (Miss. Ct. App. 2010).

RESEARCH REFERENCES

ALR.
Effect of nonsuit, dismissal, or discontinuance of action on previous orders. 11 A.L.R.2d 1407.

Am. Jur.
5 Am. Jur. 2d, Appellate Review § 710.

CJS.
5 C.J.S., Appeal and Error §§ 903-905.

§§ 11-3-17 and 11-3-19. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-3-17. [Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (25); 1857, ch. 63, art. 23; 1871, § 425; 1880, § 1419; 1892, § 4358; 1906, § 4924; Hemingway's 1917, § 3200; 1930, § 3384; 1942, § 1968]

§ 11-3-19. [Codes, 1880, § 1418; 1892, § 4357; 1906, § 4923; Hemingway's 1917, § 3199; 1930, § 3385; 1942, § 1969]

Editor's Notes — Former § 11-3-17 provided for the revival or dismissal of an action upon the death of a party.

Former § 11-3-19 provided that a bill of exceptions could contain matters of record without having a record distinct from the bill.

§ 11-3-21. Motion to discharge supersedeas in certain cases.

A motion to discharge a supersedeas in an appeal to the Supreme Court may be made before and heard by the court on ten days' notice to the opposite party, at any time before the day to which the appeal is returnable, and the court shall make such orders and render such judgment as may be proper in the case.

HISTORY: Codes, 1880, § 1421; 1892, § 4359; 1906, § 4925; Hemingway's 1917, § 3201; 1930, § 3386; 1942, § 1970.

JUDICIAL DECISIONS

1. In general.

Supersedeas of a decree awarding temporary custody of a child to parent seeking a change in custody, upon evidence heard by the chancery court, is not proper where such evidence is not before the Supreme Court. Swager v. Swager, 246 Miss. 248, 148 So. 2d 516, 1963 Miss. LEXIS 438 (Miss. 1963).

This section [Code 1942, § 1970] has no application to appeal under Code 1942, § 1163, as right to appeal with supersedeas is unquestionably granted by § 1163, and operation of this section must be confined to cases in which, from nature of case, law does not permit supersedeas. Coulter v. Banks, 38 So. 2d 696 (Miss. 1949).

Supersedeas bond not discharged on motion in Supreme Court on ground sureties were misled into signing it and one of them notified the clerk before it was filed not to approve it. Douglas v. Parsons-May-Oberschmidt Co., 101 Miss. 620, 57 So. 624, 1911 Miss. LEXIS 123 (Miss. 1911).

An appeal with supersedeas, granted from an unappealable interlocutory order, will, upon motion, be discharged by the Supreme Court. Hanon v. Weil, 69 Miss. 476, 13 So. 878, 1891 Miss. LEXIS 175 (Miss. 1891).

It is only where from the nature of the

case supersedeas on appeal is not allowable that a motion can be made in the Supreme Court under this section [Code 1942, § 1970] to discharge a supersedeas. Alabama & V. R. Co. v. Bolding, 69 Miss. 264, 13 So. 846, 1891 Miss. LEXIS 171 (Miss. 1891).

Supersedeas without bond held not discharged as to writ of possession, although bond insufficient as to recovery for mesne profits. Lum v. Reed, 53 Miss. 71, 1876 Miss. LEXIS 37 (Miss. 1876).

RESEARCH REFERENCES

CJS.
4 C.J.S., Appeal and Error §§ 659, 666.

§§ 11-3-23 and 11-3-25. Repealed.

Repealed by Laws, 2002, 3rd Ex Sess, ch. 4, § 14, eff from and after passage (approved January 1, 2003).

11-3-23. [Codes, Hutchinson's 1848, ch. 63, class 4, art. 2 (152); 1857, ch. 63, art. 12; 1871, § 414; 1880, § 1422; 1892, § 4360; 1906, § 4926; Hemingway's 1917, § 3202; 1930, § 3387; 1942, § 1971; Laws, 1977, ch. 446; Laws, 1978, ch. 335, § 3; Laws, 1980, ch. 533, § 1, eff from and after July 1, 1980.]

11-3-25. [Codes, 1880, § 1423; 1892, § 4361; 1906, § 4927; Hemingway's 1917, § 3203; 1930, § 3388; 1942, § 1972.]

Editor's Notes — Former § 11-3-23 set a procedure for computation in judgments for damages.

Former § 11-3-25 established a procedure for cases where amount in controversy is not specified.

§ 11-3-27. Judgment on bond for supersedeas.

In case a bond has been given for a supersedeas, the judgment of the Supreme Court, on affirming the judgment or decree of the court below, or on a dismissal of the appeal by the appellant or the court, shall be for the money adjudged or decreed against appellant, and damages and costs, or for the specific property and damages and costs, or for the damages and costs, as the case may be, against all the obligors in the bond who may be living at that time, and execution may be issued thereon accordingly. If any of the obligors be dead, his representatives may be summoned to show cause why judgment should not be rendered against them on the bond; and if good cause be not shown to the contrary, judgment shall be entered against them in like manner as against the living obligors, and certified to the court below, and execution may be issued thereon.

HISTORY: Codes, 1880, § 1425; 1892, § 4362; 1906, § 4928; Hemingway's 1917, § 3204; 1930, § 3389; 1942, § 1973.

Cross References — Proceedings on death of surety on bonds, see §§ 11-1-29 to 11-1-35.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Liability of sureties.
3. Estoppel.

1. In general.

The requirement as to the amount of a supersedeas bond is not met by giving bonds with different sureties for varying amounts aggregating the required amount. Copeland v. Robertson, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

Where an appeal was dismissed because of the appellant's failure to file an appeal bond within the required time, under this section [Code 1942, § 1973] statutory damages will be allowed. Davidson v. Hunsicker, 224 Miss. 203, 80 So. 2d 834, 1955 Miss. LEXIS 480 (Miss. 1955).

Supreme Court's judgment must be enforced by court from which appeal came after its certification thereto by Supreme Court. Eastman-Gardiner Naval Store Co. v. Gregory, 169 Miss. 782, 139 So. 626, 1932 Miss. LEXIS 3 (Miss. 1932).

Supreme Court cannot render summary judgment on appeal bond, where judgment of lower court did not award money recovery. Lamas v. Renaldo, 152 Miss. 353, 118 So. 417, 1928 Miss. LEXIS 214 (Miss. 1928).

2. Liability of sureties.

The dismissal of an appeal for failure to file the appeal bond within the required time is a breach of the conditions of the appeal bond so as to render the sureties liable. Davidson v. Hunsicker, 224 Miss. 203, 80 So. 2d 834, 1955 Miss. LEXIS 480 (Miss. 1955).

In a suit to remove tenant for nonpayment of rent, where the Supreme Court affirmed judgment for the landlord, money judgment would be assessed against tenant's supersedeas bond for rent in default for the period in which an appeal was pending. Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838, 1955 Miss. LEXIS 646 (Miss. 1955).

Circuit court, when affirming money judgment of county court, where appeal bond supersedes judgment, should render judgment on bond for amount of judgment affirmed, with interest thereon from date of rendition at same rate as borne by judgment affirmed, court costs, and six per cent damages on amount of judgment. Ellis v. S. Pellegrini, Inc., 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

Appellees held not entitled to judgment against sureties on appeal bond in partnership settlement case, where judgment was reversed as to two items. Arrington v. Stabley, 126 So. 842 (Miss. 1930).

3. Estoppel.

Where a party appealed and obtained a bond styled "appeal bond with supersedeas" in an amount sufficient to effect supersedeas, and had the benefit of supersedeas, in that execution of judgment was stayed, but there was no indication that the bonds were liable for the amount of judgment as required of supersedeas bonds by Code 1942, § 1973, such party was estopped in a suit on the judgment which had been affirmed, from changing his position and contending that the bond did not toll the statute of limitations since it failed to include the conditions imposed by Code 1942, § 1163 requiring that the bond be conditioned that the appellant will satisfy the judgment or decree. Breland v. International Paper Co., 233 So. 2d 827, 1970 Miss. LEXIS 1686 (Miss. 1970).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 359, 360.

CJS.

4 C.J.S., Appeal and Error §§ 644, 646, 663.

5 C.J.S., Appeal and Error §§ 1234 et seq.

§ 11-3-29. Repealed.

Repealed, by Laws, 1978, ch. 335, § 41, eff from and after July 1, 1978.

[Codes, 1880, § 1426; 1892, § 4363; 1906, § 4929; Hemingway's 1917, § 3205; 1930, § 3390; 1942, § 1974]

Editor's Notes — Former § 11-3-29 covered judgments for costs in certain cases.

§ 11-3-31. Judgment certified to be enforced.

On receiving the certificate of the clerk of the Supreme Court of the judgment of that court in any matter, it shall be the duty of the clerk of the court below to issue the proper process to enforce the judgment according to its terms.

HISTORY: Codes, 1880, § 1427; 1892, § 4364; 1906, § 4930; Hemingway's 1917, § 3206; 1930, § 3391; 1942, § 1975.

Cross References — Executions on judgments, see §§ 13-3-111 et seq.

RESEARCH REFERENCES

ALR.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 670, 671.

CJS.

5 C.J.S., Appeal and Error §§ 1136-1139.

§ 11-3-33. Bond may be excepted to.

The sufficiency of a bond in any respect as a security may be excepted to before the Supreme Court, or a judge thereof in vacation, on five (5) days' notice to the opposite party and, if the exception be sustained and the security be not immediately perfected, the appeal shall cease to operate as a supersedeas, and the supersedeas shall be discharged by order of the court or judge, and execution may be issued on the judgment or decree appealed from; and the Supreme Court may give judgment on the bond as in other cases, as if the supersedeas had not been discharged. If necessary, a new execution may be issued on the judgment, although one may have been issued on the discharge of the supersedeas.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class 4, art. 7 (2); 1857, ch. 63, art. 10; 1871, § 412; 1880, § 1428; 1892, § 4365; 1906, § 4931; Hemingway's 1917, § 3207; 1930, § 3392; 1942, § 1976; Laws, 1978, ch. 335, § 4, eff from and after July 1, 1978.

Cross References — Authority of court or judge to require new security, see § 11-1-23.

Payment of bond in judicial review of final decision of employee appeal board, see § 25-9-132.

JUDICIAL DECISIONS

1. In general.

Since appellant's filing of two appeal bonds totaling 125 per cent of the judgment appealed from, under which different sureties bound themselves for a stated portion of the required supersedeas bond, was not a sufficient compliance with Code 1942, §§ 1163 and 1973, appellee's exceptions to the sufficiency of the bonds would be sustained, unless within 30 days appellant filed a good and sufficient supersedeas bond. Copeland v. Robertson, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 270, 353, 359, 360.

CJS.

4 C.J.S., Appeal and Error §§ 445 et seq., 519, 520, 531-535 et seq.

5 C.J.S., Appeal and Error §§ 1234 et seq.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-3-35. Judgment not to be reversed for certain errors.

No judgment in any case originating in a justice court, or in a municipal court, and appealed to the circuit court, shall be reversed because it may appear in the Supreme Court transcript that the judgment or record of the said justice or municipal court was not properly certified or was not certified at all, or was missing in whole or in part, unless the record further shows that objection on that account was made in the circuit court, in the absence of which objection in the circuit court there shall be a conclusive presumption that the defects in this clause mentioned did not exist in the circuit court proceedings: Provided however, that the foregoing clause shall not apply to cases wherein a record in the supreme court of the transcript from the justice or municipal court is necessary to a fair understanding of the proceedings in the circuit court.

HISTORY: Codes, 1880, § 1433; 1892, § 4370; 1906, § 4936; Hemingway's 1917, § 3212; 1930, § 3403; 1942, § 1987.

Cross References — No reversal for harmless errors, see M.R.C.P. 61.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Questions first raised on appeal.
3. Jurisdictional matters.
4. Matters of pleading.
5. Parties.
6. Evidence.
7. —Admission and exclusion.
8. —Weight and sufficiency.

9. Instructions.
10. Matters pertaining to record.

1. In general.

Decree of lower court which is erroneous in awarding husbands of wives who predeceased wives' parents interest in lands of parents will be modified on appeal of proceeding to determine rights of parties in realty, though not made an issue on appeal, to avoid possibility of making decree final with error therein. Dunaway v. McEachern, 37 So. 2d 767 (Miss. 1948).

Generally errors committed during trial are not reviewable unless assigned in motion for a new trial. Hayes v. Slidell Liquor Co., 99 Miss. 583, 55 So. 356, 1911 Miss. LEXIS 228 (Miss. 1911).

Supreme Court cannot consider merits of controversy unless passed on by lower court. Ascher & Baxter v. Edward Moyse & Co., 101 Miss. 36, 57 So. 299, 1911 Miss. LEXIS 96 (Miss. 1911).

Improper remarks by counsel not reviewed without exceptions taken at the time. Mississippi C. R. Co. v. Turnage, 95 Miss. 854, 49 So. 840, 1909 Miss. LEXIS 294 (Miss. 1909) but see Hall v. State, 539 So. 2d 1338, 1989 Miss. LEXIS 104 (Miss. 1989).

2. Questions first raised on appeal.

Where a justice of the peace had not certified record made in his court as required by statute, and there was no objection made at the trial, the objection could not be made for the first time in the Supreme Court. Laird v. Forbes, 214 Miss. 250, 58 So. 2d 660, 1952 Miss. LEXIS 464 (Miss. 1952).

Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. Brooks v. State, 209 Miss. 150, 46 So. 2d 94, 1950 Miss. LEXIS 373 (Miss. 1950).

An objection to a variance between indictment and proof which is curable by amendment must be made before the verdict and, if not then made, is waived. Horn v. State, 165 Miss. 169, 147 So. 310, 1933 Miss. LEXIS 293 (Miss. 1933).

Defendant not objecting in circuit court to record of proceedings in justice court could not object for first time in Supreme Court. Lott v. Watkins, 162 Miss. 507, 137 So. 895, 1931 Miss. LEXIS 113 (Miss. 1931).

Contention that tax assessors and collectors are necessary parties to suit for back taxes cannot be raised first on appeal. Delta & Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190, 1908 Miss. LEXIS 165 (Miss. 1908).

Defendants in suit to quiet title claiming at trial under an alleged sale for taxes for the year 1874, could not assert title under such sale as a sale under the abatement act and by limitations for the first time on appeal. Kennedy v. Sanders, 90 Miss. 524, 43 So. 913, 1907 Miss. LEXIS 92 (Miss. 1907), overruled, Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466, 1911 Miss. LEXIS 48 (Miss. 1911).

Objection that tax title did not contain endorsement expressly required by law may be made for the first time on appeal. McLemore v. Anderson, 92 Miss. 42, 43 So. 878, 1907 Miss. LEXIS 4 (Miss. 1907), overruled, Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466, 1911 Miss. LEXIS 48 (Miss. 1911).

Where bill alleges assignment of trust deed and the answer admits it, it cannot be questioned on appeal. Watkins v. McDonald, 41 So. 376 (Miss. 1906).

In action to cancel conveyances under a trust deed, contention that holder of trust deed exhausted her power by appointment of substituted trustees cannot be raised first on appeal. Watkins v. McDonald, 41 So. 376 (Miss. 1906).

Void judgment reversed though invalidity urged for first time on appeal. Alexander v. Porter, 88 Miss. 585, 41 So. 6, 1906 Miss. LEXIS 161 (Miss. 1906).

3. Jurisdictional matters.

Jurisdiction of trial court may be questioned for first time on appeal. Rodgers v. Hattiesburg, 99 Miss. 639, 55 So. 481, 1911 Miss. LEXIS 234 (Miss. 1911); Brasham v. State, 140 Miss. 712, 106 So. 280, 1925 Miss. LEXIS 306 (Miss. 1925).

Supreme Court has no jurisdiction where there is no bond in the record of appeal from justice to the circuit court. Humphreys v. McFarland, 48 So. 182

(Miss. 1909), overruled, Jones v. State, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929); Johnson v. Marshall, 48 So. 182 (Miss. 1909), overruled, Jones v. State, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

Appeal from interlocutory decree without order of court allowing it, dismissed and case remanded. Greve v. McGee, 92 Miss. 190, 45 So. 706, 1907 Miss. LEXIS 23 (Miss. 1907).

Mere failure of clerk to enter on the minutes order of court calling special term does not oust jurisdiction. Ex parte Neil, 90 Miss. 518, 43 So. 615, 1907 Miss. LEXIS 82 (Miss. 1907).

4. Matters of pleading.

Judgment on note not reversed on ground original note not produced and filed, where the record does not affirmatively show such to be the fact. Biles v. Wolf, 49 So. 267 (Miss. 1909).

Where petition dismissed on demurrer, question not raised in trial court cannot be reviewed. Adams v. Clarksdale, 95 Miss. 88, 48 So. 242, 1909 Miss. LEXIS 202 (Miss. 1909).

Supreme Court will not sustain demurrer to declaration not presented to lower court. Keystone Lumber Yard v. Yazoo & M. V. R. Co., 94 Miss. 192, 47 So. 803, 1908 Miss. LEXIS 28 (Miss. 1908).

Objection that complainant had no right to bring suit, not made in court below, held waived on appeal. Beason v. Coleman, 92 Miss. 622, 46 So. 49, 1908 Miss. LEXIS 195 (Miss. 1908).

5. Parties.

Contention that tax assessors and collectors are necessary parties to suit for back taxes cannot be raised first on appeal. Delta & Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190, 1908 Miss. LEXIS 165 (Miss. 1908).

Supreme Court will of its own motion decline to act where a proper decree cannot be made without having certain persons made defendants. Gates v. Union Naval Stores Co., 92 Miss. 227, 45 So. 979, 1908 Miss. LEXIS 190 (Miss. 1908).

6. Evidence.

Case should be reversed and remanded, where plaintiff might on new hearing be able to offer evidence entitling it to recover, instead of only reversed. Planters' Mercantile Co. v. Armour Packing Co., 109 Miss. 470, 69 So. 293, 1915 Miss. LEXIS 180 (Miss. 1915); Planters' Mercantile Co. v. Christian Peper Tobacco Co., 69 So. 295 (Miss. 1915); Schloss & Rothschild v. Haupt, 69 So. 295 (Miss. 1915).

A case cannot be reversed by the Supreme Court on the ground that the evidence did not show corporate existence where no objection was made on that ground in the court below. James v. State, 77 Miss. 370, 26 So. 929, 1899 Miss. LEXIS 59 (Miss. 1899).

7. —Admission and exclusion.

In action for damages resulting from automobile collision, where objection is sustained and court admonishes jury to disregard question, no prejudice sufficient to require mistrial is manifested by mere asking of defendant if he did not operate slot machines, defendant having disclosed without objection that he was operating bar in violation of law. Kouvarakis v. Hawver, 208 Miss. 697, 45 So. 2d 278, 1950 Miss. LEXIS 288 (Miss. 1950).

Judgment of circuit court will not be reversed on appeal to Supreme Court for error in admission of incompetent evidence which was either of no effect, or, if effective, was prejudicial to appellee and not to appellant. Magnolia Miss Dress Co. v. Zorn, 204 Miss. 1, 36 So. 2d 795, 1948 Miss. LEXIS 337 (Miss. 1948).

Defendant not objecting in the lower court cannot complain of admission of mortuary tables because the pleadings did not show value of decedent's life expectancy. Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735, 1909 Miss. LEXIS 241 (Miss. 1909).

Party could not question the competency of parol testimony on motion for new trial. Anderson v. Maxwell, 94 Miss. 138, 48 So. 227, 1908 Miss. LEXIS 37 (Miss. 1908).

Rulings on admission and exclusion of evidence not considered unless motion for a new trial directs attention of the court to particular ruling. Carpenter v. Savage, 93 Miss. 233, 46 So. 537, 1908 Miss. LEXIS 92 (Miss. 1908).

Where testimony appears incompetent only when considered with other testimony not objected to, it is not ground for reversal. Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 So. 505, 1906 Miss. LEXIS 195 (Miss. 1906).

8. —Weight and sufficiency.

Verdict on conflicting evidence not disturbed. St. Louis & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471, 1911 Miss. LEXIS 164 (Miss. 1911); Thompson v. Poe, 104 Miss. 586, 61 So. 656, 1913 Miss. LEXIS 69 (Miss. 1913); Soverign Camp, W. W. v. McDonald, 109 Miss. 167, 68 So. 74, 1915 Miss. LEXIS 130 (Miss. 1915); Ryals v. Douglas, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

Chancellor's findings not disturbed on appeal unless against preponderance of evidence. Gross v. Jones, 89 Miss. 44, 42 So. 802, 1906 Miss. LEXIS 86 (Miss. 1906); Carter v. Catchings, 48 So. 515 (Miss. 1909); Moyse v. Howie, 98 Miss. 30, 53 So. 402, 1910 Miss. LEXIS 42 (Miss. 1910); Heard v. Cottrell, 100 Miss. 42, 56 So. 277, 1911 Miss. LEXIS 12 (Miss. 1911); Southern Plantations Co. v. Kennedy Heading Co., 104 Miss. 131, 61 So. 166, 1913 Miss. LEXIS 14 (Miss. 1913); Lott v. Hull, 104 Miss. 308, 61 So. 421, 1913 Miss. LEXIS 37 (Miss. 1913); Lee v. Wilkinson, 105 Miss. 358, 62 So. 275, 1913 Miss. LEXIS 206 (Miss. 1913); Bland v. Bland, 105 Miss. 478, 62 So. 641, 1913 Miss. LEXIS 233 (Miss. 1913); Northern Assurance Co. v. J. J. Newman Lumber Co., 105 Miss. 688, 63 So. 209, 1913 Miss. LEXIS 248 (Miss. 1913); Aldridge v. Bogue Phalia Drainage Dist., 106 Miss. 626, 64 So. 377, 1913 Miss. LEXIS 171 (Miss. 1913); Evans v. Sharbrough, 106 Miss. 687, 64 So. 466, 1914 Miss. LEXIS 5 (Miss. 1914); Freeman v. Freeman, 107 Miss. 750, 66 So. 202, 1914 Miss. LEXIS 138 (Miss. 1914); Golden v. Bank of Lake, 108 Miss. 420, 66 So. 782 (Miss. 1914); Humber v. Humber, 109 Miss. 216, 68 So. 161, 1915 Miss. LEXIS 137 (Miss. 1915); Rice v. W. L. Robinson Lumber Co., 110 Miss. 607, 70 So. 817, 1915 Miss. LEXIS 92 (Miss. 1915); Puryear v. Austin, 205 Miss. 590, 39 So. 2d 257, 1949 Miss. LEXIS 449 (Miss. 1949); Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949); James v. Federal Royalty Co., 44 So. 2d 542 (Miss. 1950).

9. Instructions.

Peremptory instruction held erroneous in view of the evidence. Illinois C. R. Co. v. Threefoot Bros. & Co., 121 Miss. 468, 83 So. 635, 1920 Miss. LEXIS 92 (Miss. 1920).

Supreme Court will not set aside verdict merely because it believes it was contrary to weight of evidence. St. Louis & S. F. R. Co. v. Bowles, 107 Miss. 97, 64 So. 968, 1914 Miss. LEXIS 55 (Miss. 1914).

Error in directing a verdict held reviewable though not assigned in motion for new trial. Hayes v. Slidell Liquor Co., 99 Miss. 583, 55 So. 356, 1911 Miss. LEXIS 228 (Miss. 1911).

Defendant cannot complain of failure to give instruction not requested by him, as to amount of damages, where amount assessed was well within sum jury could properly assess. Independent Order of S. & D. of J. v. Wilkes, 98 Miss. 179, 53 So. 493, 1910 Miss. LEXIS 50 (Miss. 1910).

Error in instruction disregarded, where not included in motion for new trial. Southern R. Co. v. Jackson, 49 So. 738 (Miss. 1909).

Case will not be reversed because peremptory instruction for plaintiff was given in the absence of defendant's counsel and without giving defendant an opportunity to present additional proof, where motion for new trial made no showing as to materialty of the additional evidence. Evans v. Lilly & Co., 95 Miss. 58, 48 So. 612, 1909 Miss. LEXIS 383 (Miss. 1909).

Where case is disposed of by peremptory instruction, assignment of error directed to such disposition brings the entire case into review and permits argument on matters first raised in the Supreme Court. Illinois C. R. Co. v. State, 94 Miss. 759, 48 So. 561, 1909 Miss. LEXIS 355 (Miss. 1909).

Objections to instructions not made in the court below will not be considered by the Supreme Court, and the acts of 1896, p. 91 on the subject of stenographers' notes does not change this rule. Alexander v. Flood, 77 Miss. 925, 28 So. 787, 1900 Miss. LEXIS 60 (Miss. 1900).

10. Matters pertaining to record.

The many cases cited under Code 1972, § 11-51-87 holding that the supreme court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in the record on appeal are overruled because of two statutes-Code 1972, §§ 11-3-35 and 99-35-143-which were apparently overlooked by the early cases. Avera v. State, 300 So. 2d 787, 1974 Miss. LEXIS 1636 (Miss. 1974).

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. Whittington v. State, 218 Miss. 631, 67 So. 2d 515, 1953 Miss. LEXIS 581 (Miss. 1953).

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. Lee v. State, 190 Miss. 877, 1 So. 2d 492, 2 So. 2d 148, 1941 Miss. LEXIS 85 (Miss. 1941).

Where record did not contain judgment of justice court, appeal bond, or transcript of proceedings in justice court, but such transcript was unnecessary for understanding of proceedings in circuit court, statute prevents reversal. McCluney v. State, 162 Miss. 333, 138 So. 356, 1931 Miss. LEXIS 118 (Miss. 1931).

Without judgment of circuit court showing establishment, it is presumed certification of record was not established in circuit court on appeal from justice. Brasham v. State, 140 Miss. 712, 106 So. 280, 1925 Miss. LEXIS 306 (Miss. 1925).

Assignments without basis in record will not be considered. Higgins v. State, 120 Miss. 823, 83 So. 245, 1919 Miss. LEXIS 134 (Miss. 1919).

Court will not reverse and remand for new trial where original papers have been lost through no fault of appellee. Germaine v. Harwell, 104 Miss. 679, 61 So. 659, 1913 Miss. LEXIS 72 (Miss. 1913).

Objection that stenographer's notes were authenticated and filed out of time should be made by motion to strike before the case is submitted, and cannot be made for the first time on suggestion of error. Whittaker v. Godwin, 97 Miss. 663, 53 So. 413 (Miss. 1910).

Where clerk certifies there is no motion for continuance on file, appellant must bring the motion into the record or account for its absence before it can be reviewed. Greenburg v. Sauls Bros. & Co., 91 Miss. 410, 45 So. 569 (Miss. 1907).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 572-577, 584- 590.

CJS.

5 C.J.S., Appeal and Error §§ 678, 1112-1120, 1121 et seq.

§ 11-3-37. Appellant not entitled to reversal for error as to another.

In all cases, civil and criminal, a judgment or decree appealed from may be affirmed as to some of the appellants and be reversed as to others; and one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case. And when a judgment or decree shall be affirmed as to some of the appellants and be reversed as to others, the case shall thereafter be proceeded with, so far as necessary, as if the separate suits had been begun and prosecuted; and execution of the judgment of affirmance may be had accordingly. Costs may be adjudged in such cases as the supreme court shall deem proper.

HISTORY: Codes 1880, § 1440; 1892, § 4378; 1906, § 4944; Hemingway's 1917, § 3220; 1930, § 3404; 1942, § 1988.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Specific applications.
3. Statute held inapplicable.

1. In general.

This section and the next succeeding one [Code 1942, §§ 1988, 1989] (§ 4945, Code 1906) do not by the rule "expresso unius est exclusio alterius" prohibit the Supreme Court from limiting the issues on granting new trial where such right exists by some other statute or the common law. Yazoo & M. V. R. Co. v. Scott, 108 Miss. 871, 67 So. 491, 1914 Miss. LEXIS 287 (Miss. 1914).

2. Specific applications.

In a wrongful death action, the misjoinder of nursing home licensees and administrators did not in any way prejudice a parent company of the nursing home; licensees and administrators owed a duty to their employer, and as such the parties could have been called by the decedent's estate to provide relevant testimony, and the record demonstrated that all of the licensees and administrators did not testify, and those who did said little that advanced the case against the parent company. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

Two defendants did not have standing to appeal a determination that two other defendants were not liable for an award to the plaintiff of attorneys' fees and costs since, no matter what the outcome of the appeal, the first two defendants would not be relieved of their obligation to pay attorneys' fees and expenses. Mauck v. Columbus Hotel Co., 741 So. 2d 259, 1999 Miss. LEXIS 266 (Miss. 1999).

The defendant lessors did not have standing to the dismissal of intervenors on appeal in a proceeding to cancel a lease since, no matter what the outcome of the appeal, the lessors would not be relieved of their obligation to pay attorneys' fees and expenses, and consequently their rights remained unaffected by the dismissal of the intervenors. Mauck v. Columbus Hotel Co., 1999 Miss. LEXIS 203 (Miss. June 17, 1999), op. withdrawn, sub. op., 741 So. 2d 259, 1999 Miss. LEXIS 266 (Miss. 1999).

The language of the statute applies to all cases, both civil and criminal and, therefore, two defendants did not have standing to raise the alleged error of the chancery court in dismissing two other defendants from the case, notwithstanding their contention that their potential liability was increased dramatically by the dismissal of those defendants. Mauck v. Columbus Hotel Co., 1998 Miss. LEXIS 577 (Miss. Nov. 25, 1998), op. withdrawn, sub. op., in part, 1999 Miss. LEXIS 203 (Miss. June 17, 1999).

Under this statute, an employer could not complain of the verdict against him alone in a case in which both he and his employee were sued jointly. Capital Transport Co. v. McDuff, 319 So. 2d 658, 1975 Miss. LEXIS 1484 (Miss. 1975).

Where two persons are jointly indicted and tried for a crime, and the state's case against both defendants consists of the testimony of one witness, whose testimony is identical as to both defendants, a verdict acquitting one defendant and convicting the other does not entitle the defendant convicted to a discharge since verdicts in such cases need not be consistent. Newell v. State, 308 So. 2d 68, 1975 Miss. LEXIS 1829 (Miss. 1975).

The fact that the driver of a truck, on whose negligence his employer company's liability depended, was exonerated from liability for injuries sustained by an automobile passenger in the collision between the automobile and the truck, did not require a reversal of the judgment for the passenger against the truck driver's employer. D. W. Boutwell Butane Co. v. Smith, 244 So. 2d 11, 1971 Miss. LEXIS 1314 (Miss. 1971).

One defendant is in no position to complain by reason of the fact that the jury found for, and thereby released, his co-defendant, an alleged joint tortfeasor. Canton Broiler Farms, Inc. v. Warren, 214 So. 2d 671, 1968 Miss. LEXIS 1322 (Miss. 1968).

In an action for injuries sustained by the plaintiff when taxicab in which she was riding collided with another automobile, the failure to return a verdict against the driver of the cab does not affect the appeal from the judgment against the owner of the cab and business of furnishing taxi service to the public. Rawlings v. Inglebritzen, 211 Miss. 760, 52 So. 2d 630, 1951 Miss. LEXIS 403 (Miss. 1951).

Judgment of circuit court will not be reversed on appeal to Supreme Court for error in admission of incompetent evidence which was either of no effect, or, if effective, was prejudicial to appellee and not to appellant. Magnolia Miss Dress Co. v. Zorn, 204 Miss. 1, 36 So. 2d 795, 1948 Miss. LEXIS 337 (Miss. 1948).

Judgment not valid as to co-defendants not served with process, but under this section it is valid against those defendants over whom the court acquired jurisdiction. Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

Case not reversed as to partners served with process merely because others were not served. Hattiesburg Hardware Co. v. Pittsburg Steel Co., 115 Miss. 663, 76 So. 570, 1917 Miss. LEXIS 247 (Miss. 1917).

In action for wrongful killing of person, judgment against railroad company, but also in favor of conductor sued jointly with it, presents no ground for reversal. St. Louis & S. F. R. Co. v. Sanderson, 99 Miss. 148, 54 So. 885, 1910 Miss. LEXIS 27 (Miss. 1910).

A third party, claiming title to property seized in attachment proceedings, cannot complain of errors committed against defendant. Whitney v. Gregory, 16 So. 292 (Miss. 1894).

Where one of several defendants appealed from the decree against him, and his co-defendants, who had been defectively served by publication, entered their appearance in the supreme court and consented to a severance, thereby electing to abide by the decree, the appellant could not complain of the error against his co-defendants who failed to assign it. Burks v. Burks, 66 Miss. 494, 6 So. 244, 1889 Miss. LEXIS 135 (Miss. 1889).

Where suit commenced by attachment was premature as to one defendant but not as to the other, it was proper to affirm the judgment as to the latter and reverse the judgment against the former. Terry v. Curd & Sinton Mfg. Co., 66 Miss. 394, 6 So. 229, 1889 Miss. LEXIS 113 (Miss. 1889).

A defendant in a judgment in attachment has no right to complain of errors in a judgment against a garnishee therein who does not complain. Tabler, Crudup & Co. v. Mitchell, 62 Miss. 437, 1884 Miss. LEXIS 100 (Miss. 1884).

3. Statute held inapplicable.

This section does not apply to a judgment absolutely void as to all parties. Weis v. Aaron, 75 Miss. 138, 21 So. 763, 1897 Miss. LEXIS 98 (Miss. 1897), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 687-689, 692- 698.

CJS.

5 C.J.S., Appeal and Error §§ 1232 et seq., 1106-1109.

§ 11-3-39. Judgments affirmed in part and reversed in part.

Where the judgment appealed from is for property, real or personal, and damages, the supreme court, finding the judgment to be erroneous as to the damages only, may affirm it as to the property and reverse and remand it for a new trial as to the damages, and may adjudge the costs as may be proper.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (7); 1857, ch. 63, art. 13; 1871, § 415; 1880, § 1441; 1892, § 4379; 1906, § 4945; Hemingway's 1917, § 3221; 1930, § 3405; 1942, § 1989.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Costs.

1. In general.

Obligations of partners, joint and several; judgment may be rendered against one partner in suit against both; judgment against all partners when evidence authorized the judgment against only one reversed in part and affirmed in part. Wise v. Cobb, 135 Miss. 673, 100 So. 189, 1924 Miss. LEXIS 58 (Miss. 1924).

In civil actions Supreme Court has common law power to award new trials on issue of damages only. Yazoo & M. V. R. Co. v. Scott, 108 Miss. 871, 67 So. 491, 1914 Miss. LEXIS 287 (Miss. 1914).

This section and the preceding one [Code 1942, § 1988] (§ 4944, Code of 1906) do not by the rule "expressio unius est exclusio alterius" prohibit the Supreme Court from limiting the issues on granting new trial where such right exists by some other statute or the common law. Yazoo & M. V. R. Co. v. Scott, 108 Miss. 871, 67 So. 491, 1914 Miss. LEXIS 287 (Miss. 1914).

This section does not apply to judgment at law for default in payment over of taxes collected. Adams v. Carter, 92 Miss. 579, 47 So. 409, 1908 Miss. LEXIS 255 (Miss. 1908) but see Davis v. Noblitt & Capers Electric Co., 594 So. 2d 610, 1992 Miss. LEXIS 65 (Miss. 1992).

2. Costs.

Where affirmance of the judgment below is conditioned on a remittitur of damages, costs below should be adjudged against appellant, and the appeal costs may properly be assessed one-half to appellant and one-half to appellees. Illinois C. R. Co. v. Nelson, 245 Miss. 411, 148 So. 2d 712 (Miss. 1963).

Where judgment for plaintiff was reversed in part and Supreme Court rendered judgment trial court should have rendered, defendant was "successful party" entitled to full costs on appeal. Aetna Life Ins. Co. v. Thomas, 166 Miss. 53, 144 So. 50, 1932 Miss. LEXIS 306 (Miss. 1932).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 687-689, 692- 698.

CJS.

5 C.J.S., Appeal and Error §§ 1232 et seq., 1106-1108.

§ 11-3-41. Final judgment to be certified to court below; collection of court costs.

It shall be the duty of the clerk of the court below, upon receiving the mandate of the Supreme Court, to issue the proper execution on the final judgment or decree, if the same be for the plaintiff in the original cause, for the amount of money or other thing adjudged to the plaintiff, and all costs paid in the court below if not previously paid; and, if the judgment be rendered for the defendant in the original cause, then, on receipt of the mandate, execution shall issue against the plaintiff in the cause for the defendant's costs paid in the court below. In cases where the Supreme Court assesses the costs against the appellee, the appellant shall, with no further court action, be entitled to a judgment against the appellee in the amount expended by the appellant on court costs. The appellee shall be responsible for the cost of collection of this judgment, including attorney's fees. If the Clerk of the Supreme Court fails to issue the mandate as required, he shall forfeit to the aggrieved party One Hundred Dollars ($100.00), to be recovered by motion before the Supreme Court on five (5) days' notice.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class 4, art. 1 (8); 1857, ch. 63, art. 14; 1871, § 416; 1880, § 1442; 1892, § 4380; 1906, § 4946; Hemingway's 1917, § 3222; 1930, § 3406; 1942, § 1990; Laws, 1978, ch. 335, § 5; Laws, 1979, ch. 482, § 1; Laws, 1991, ch. 573, § 15, eff from and after July 1, 1991.

Cross References — Chancery money decrees being furnished to circuit clerk, see § 9-5-159.

Final record of causes in chancery court, see § 9-5-161.

Final record of suits in circuit court, see § 9-7-127.

Execution on judgments and decrees, see §§ 13-3-111 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Certification of judgment.
3. —Final judgment or decree.
4. Enforcement of judgment.
5. Under former law.

1. In general.

Where a suggestion of error was filed in the supreme court after rendition of judgments of affirmance by the supreme court on appeal, this filing had the effect of suspending the judgment, so that the parties who had three months for performance of condition of judgment had three months after disposal of suggestion of error to perform such condition. Burton v. Redmond, 220 Miss. 704, 71 So. 2d 772, 1954 Miss. LEXIS 486 (Miss. 1954).

Where defendant was convicted of crime of robbery with firearms and suggestion of error was overruled by Supreme Court of the state and later Supreme Court of United States dismissed the appeal and the mandate of the court was received and filed by the clerk of court, a petition for stay of mandate which was unknown to the procedure in the Supreme Court after the overruling of a suggestion of error in a criminal case was unauthorized. Brooks v. State, 213 Miss. 1, 56 So. 2d 9, 1952 Miss. LEXIS 325 (Miss. 1952).

An appeal from a county court judgment denying petition for habeas corpus to secure release of accused who is held as fugitive from justice, and after the bond for appeal to the Supreme Court was approved and filed, the only method known to reinvest jurisdiction in the county court is by reversal and remand thereto by the Supreme Court and the filing in the county court of a mandate from the Supreme Court. Roberson v. Quave, 211 Miss. 398, 51 So. 2d 777, 1951 Miss. LEXIS 370 (Miss. 1951).

It was neither the desire nor the intention of the legislature in the enactment of this section, to regulate or limit the jurisdiction of the supreme court in the matter of entertaining timely suggestions of error for the purpose of reconsidering, modifying or changing its decisions and judgments, as the circumstances and justice of the case may require. White v. State, 190 Miss. 589, 195 So. 479, 1940 Miss. LEXIS 173 (Miss. 1940).

2. Certification of judgment.

The supreme court was not divested of jurisdiction to hear a manslaughter case on suggestion of error after mandate was issued to and received by the court below upon reversal of the case by a division of the supreme court, where within the fifteen days allowed for filing such suggestion of error, an extension of time was granted so as to allow thirty days for filing the same, as shown by an order duly entered upon the minutes of the court prior to the expiration of the original fifteen days allowed, notwithstanding that no order was entered in the supreme court, nor notice given to the court below, recalling such mandate at any time prior thereto. White v. State, 190 Miss. 589, 195 So. 479, 1940 Miss. LEXIS 173 (Miss. 1940).

An appellate court may recall its mandate where it has been inadvertently issued, or where it has been prematurely and erroneously issued before the expiration of the time allowed for a rehearing. White v. State, 190 Miss. 589, 195 So. 479, 1940 Miss. LEXIS 173 (Miss. 1940).

The proper construction of this section requires the clerk of the supreme court to certify a final judgment or decree within twenty days after any suggestion of error shall have been disposed of or, if none has been filed, that he then certify the judgment and issue the mandate, within the period so prescribed, after the time allowed under the rule for filing a suggestion of error, or the extended time granted under an order of the court for that purpose, shall have expired. White v. State, 190 Miss. 589, 195 So. 479, 1940 Miss. LEXIS 173 (Miss. 1940).

Where on appeal decree is entered making injunction perpetual which is certified to lower court for execution the cause is at end and lower court has no further jurisdiction. George v. Caldwell, 98 Miss. 820, 54 So. 316, 1910 Miss. LEXIS 129 (Miss. 1910).

3. —Final judgment or decree.

A final judgment or decree within the meaning of this section [Code 1942, § 1990] is not necessarily one that terminates the litigation in the case, but one that disposes finally of the appeal. Mobile & O. R. Co. v. Watly, 69 Miss. 475, 12 So. 558, 1891 Miss. LEXIS 118 (Miss. 1891).

4. Enforcement of judgment.

A mandate will not direct issuance of execution against the principal defendant and the sureties on his appeal bond for the sum of all sums due under the judgment affirmed. Thomas v. Cook, 236 Miss. 365, 109 So. 2d 861, 1959 Miss. LEXIS 327 (Miss. 1959).

Supreme Court's judgment must be enforced by court from which appeal came after its certification thereto by Supreme Court. Eastman-Gardiner Naval Store Co. v. Gregory, 169 Miss. 782, 139 So. 626, 1932 Miss. LEXIS 3 (Miss. 1932).

Supreme Court judgment, affirming circuit court judgment, affirming county court judgment, need not direct circuit court to remand case for enforcement by execution. Brandon v. Interstate Life & Acci. Co., 149 Miss. 814, 116 So. 739, 1928 Miss. LEXIS 99 (Miss. 1928).

Failure to obey judgment should be punished by court rendering it. Ganong v. Jonestown, 98 Miss. 265, 53 So. 594, 1910 Miss. LEXIS 60 (Miss. 1910).

5. Under former law.

Where an appeal by the plaintiff has been dismissed and costs were taxed to the plaintiff, but the costs were never paid, the clerk of the reviewing court could properly withhold mandate as long as the costs were not paid. Edmonds v. Delta Democrat Publishing Co., 221 Miss. 785, 75 So. 2d 73, 1954 Miss. LEXIS 594 (Miss. 1954).

Statutes permitting suit in forma pauperis applies only to a court of original jurisdiction and not to courts of appeal so as to permit setting down of a mandate on an affidavit in forma pauperis. Life & Casualty Ins. Co. v. Walters, 190 Miss. 761, 198 So. 746, 200 So. 732, 1940 Miss. LEXIS 183 (Miss. 1940).

Clerk of trial court held without authority to issue writ of garnishment for collection of costs incurred on appeal to Supreme Court. State v. Keeton, 176 Miss. 590, 169 So. 760, 1936 Miss. LEXIS 143 (Miss. 1936).

The clerk of the Supreme Court cannot be compelled to certify to the court below a final judgment or decree until the costs of the appeal, including costs for which he may issue execution, shall be paid. Mobile & O. R. Co. v. Watly, 69 Miss. 475, 12 So. 558, 1891 Miss. LEXIS 118 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Attorneys' fees as recoverable in fraud action. 44 A.L.R.4th 776.

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 670, 671.

CJS.

5 C.J.S., Appeal and Error §§ 1136-1139.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-3-43. Copy of opinion certified to court below; costs in event of successful appeal.

In all cases in which the Supreme Court shall reverse the judgment or decree of the court below, and remand the cause to be proceeded within such court, or remand a cause for further proceedings, the Clerk of the Supreme Court shall prepare and certify a copy of the opinion of the Supreme Court in the case, and send it, with the mandate of the judgment or decree rendered in the cause by the Supreme Court, to the clerk of the court from which the cause was brought, or to which it may be remanded. The copy of the opinion furnished shall be preserved by the clerk to whom it is delivered, for the use of the court and parties in the case.

But in all cases wherein the appellant has paid the costs of his appeal and is the successful litigant and the action is reversed and remanded for further proceedings, with costs taxed against the appellee, the action shall not proceed further before the trial court, on application of the appellee, until the appellee has paid to the clerk of the trial court, for the benefit of the appellant, the costs so paid by the appellant in perfecting his successful appeal. Should the appellee fail to make such a refund of costs to the trial court within two (2) years next after the date of the judgment of reversal and remand by the Supreme Court, the appellee, his heirs or assigns, shall not thereafter be entitled to proceed further at his own instance and the appellee's right of action, as well as his remedy, shall be forever barred and extinguished.

HISTORY: Codes, 1880, § 1443; 1892, § 4381; 1906, § 4947; Hemingway's 1917, § 3223; 1930, § 3407; 1942, § 1991; Laws, 1948 ch. 238; Laws, 1978, ch. 335, § 6; Laws, 1991, ch. 573, § 16; Laws, 1993, ch. 452, § 1, eff from and after passage (approved March 22, 1993).

Cross References — Issuance and stay of mandate, see Miss. R. App. P. 41.

JUDICIAL DECISIONS

1. In general.

Section 11-3-43, requiring that costs be paid in order to obtain a mandate and that it be done within 2 years or the appellee will be barred from pursuing the action on remand, was tolled and did not run on an appellee's right to retrial following remand where a mandate had been issued by the clerk of the Supreme Court, even though costs had not been paid. Martin v. Reikes, 587 So. 2d 285, 1991 Miss. LEXIS 677 (Miss. 1991).

It is not within the province of the Supreme Court to deliver advisory opinions. Gipson v. State, 203 Miss. 439, 36 So. 2d 154 (1948).

Taxation of costs on affirmance in part and reversal in part. Boyd v. Applewhite, 123 Miss. 185, 85 So. 87, 1920 Miss. LEXIS 17 (Miss. 1920).

It is not essential under this section [Code 1942, § 1991] to the authority of an inferior court to proceed in a remanded case that the opinion of the Supreme Court should accompany the mandate. Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 1899 Miss. LEXIS 36 (Miss. 1899), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395, 1901 U.S. LEXIS 1278 (U.S. 1901).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Courts §§ 27- 31, 46.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-3-45. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 1444; 1892, § 4382; 1906, § 4948; Hemingway's 1917, § 3224; 1930, § 3408; 1942, § 1992; Laws, 1978, ch. 335, § 7]

Editor's Notes — Former § 11-3-45 required that the appellant prepay certain costs.

CHAPTER 5.

PRACTICE AND PROCEDURE IN CHANCERY COURTS

General Provisions. 11-5-1
Receivers. 11-5-151

GENERAL PROVISIONS

Sec.
11-5-1. Venue of suits.
11-5-3. Issue may be tried by a jury.
11-5-5. Change of venue in jury cases allowed.
11-5-7 through 11-5-29. Repealed.
11-5-31. Before whom answers of nonresidents may be sworn.
11-5-33 through 11-5-47. Repealed.
11-5-49. Answer not required in certain cases.
11-5-51. Answer or demurrer may be filed where answer not required.
11-5-53 through 11-5-73. Repealed.
11-5-75. Creditors may attack fraudulent conveyances.
11-5-77. Repealed.
11-5-79. Decree to operate as judgment of circuit court.
11-5-81. Fieri facias or garnishment on decrees for money.
11-5-83. Sheriff to execute decrees; clerk to issue process.
11-5-85. Decree to operate as a conveyance.
11-5-87 and 11-5-89. Repealed.
11-5-91. Reopening of judgment rendered on publication only.
11-5-93. Sales of realty under decrees.
11-5-95. Court may fix terms of sale.
11-5-97. Lien on land sold on credit.
11-5-99. Hour and adjournment of sales.
11-5-101. Person making sale not to purchase.
11-5-103. Report of sale of land.
11-5-105. On death of executor, or other person authorized, who shall sell or convey.
11-5-107. Sales, leases, partitions, may be reported and confirmed in vacation; proceedings.
11-5-109. Bond to prevent confirmation.
11-5-111. Decree for balance after sale of property.
11-5-113. Provisions applicable to all sales made by order or decree of the court.
11-5-115. Rights of infants saved.
11-5-117. Private sales authorized.
11-5-119 and 11-5-121. Repealed.
11-5-123. New bond required when security insufficient in certain cases.

§ 11-5-1. Venue of suits.

Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

HISTORY: Codes, 1857, ch. 62, art. 6; 1871, § 977; 1880, § 1847; 1892, § 510; 1906, § 561; Hemingway's 1917, § 321; 1930, § 363; 1942, § 1274.

Cross References — Chancellors, terms, general powers and duties of chancery court, see §§ 9-5-1 et seq.

Application to all courts of circuit court civil practice provisions, see § 11-7-1.

Venue of actions and suits generally, see §§ 11-11-1 et seq.

Provisions relating to injunctions generally, see §§ 11-13-1 et seq.

Suits to confirm title or interest, and to remove clouds on title, see §§ 11-17-1 et seq.

Partition of land by chancery court, see § 11-21-3.

Sequestration of property, see §§ 11-29-1 et seq.

Attachment in chancery against nonresident, absent or absconding debtors, see § 11-31-1 et seq.

Garnishment proceedings, see §§ 11-35-1 et seq.

Habeas corpus proceedings, see §§ 11-43-1 et seq.

Suits against state or its political subdivisions, see §§ 11-45-1 et seq.

Rules of evidence generally, see §§ 13-1-1 et seq.

Process, publication and notice generally, see §§ 13-3-1 et seq.

Limitation of actions concerning land, see §§ 15-1-7, 15-1-9.

Rules governing practice and procedure in chancery courts, see Miss. Uniform Chancery Court Rules 1.00 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Suits to confirm, or remove clouds from, title.
3. Other suits involving real or personal property.
4. Suits involving executors, etc.
5. Venue where defendant resides or is found.
6. —Necessary party defendant.

1. In general.

General venue statute for chancery court did not apply in the State's action against pharmaceutical manufacturers because the location of a foreign corporation's registered agent was irrelevant to determine venue; because the general venue statute for chancery court did not apply, and the general venue statute provided criteria that did not rely on the location of a registered agent, the trial court's reliance on the general venue state was appropriate. Purdue Pharma L.P. v. State, 256 So. 3d 1, 2018 Miss. LEXIS 415 (Miss. 2018).

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. Art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC, 864 So. 2d 939, 2004 Miss. LEXIS 12 (Miss. 2004).

A party waived his right to raise the defense of improper venue when he failed to include that defense with his initial Motion to Quash and Set Aside and extended to the court the authority to hear the Motion to Quash without raising the defense of improper venue. Lowrey v. Last Will & Testament of Smith, 543 So. 2d 1155, 1989 Miss. LEXIS 185 (Miss. 1989).

Venue was not proper in Forrest County while action in Hinds County was pending and abeyance agreed to, where statute provided that one aggrieved by denial of access to public records could institute suit in Chancery Court of County in which public body was located; contention that Board of Trustees of state institutions of higher learning could be sued in any county where it did business was rejected, where to do so would require Board to defend actions in all 82 counties; Chancery Court has no jurisdiction over defendant who neither resides nor is found in county where suit is filed, absent waiver. Board of Trustees v. Slyke, 510 So. 2d 490, 1987 Miss. LEXIS 2982 (Miss. 1987).

A Mississippi court is without jurisdiction to quiet title to lands in another state. Jacobson v. Jones, 236 Miss. 640, 111 So. 2d 408, 1959 Miss. LEXIS 360 (Miss. 1959).

This section does not confer jurisdiction, but fixes the venue or locality in which suits may be tried of which the chancery court has jurisdiction. State ex rel. Gully v. Massachusetts Bonding & Ins. Co., 187 Miss. 66, 191 So. 285, 1939 Miss. LEXIS 79 (Miss. 1939).

Chancery court has jurisdiction to remove trustee, irrespective of his domicile. Nutt v. State, 96 Miss. 473, 51 So. 401, 1910 Miss. LEXIS 171 (Miss. 1910).

This statute does not apply to suits for partition of land. Such suits are governed by the chapter on that subject. Nugent & McWillie v. Powell, 63 Miss. 99, 1885 Miss. LEXIS 23 (Miss. 1885).

2. Suits to confirm, or remove clouds from, title.

In a case in which appellant forfeited property to the State for failure to pay taxes, the Chancery Court of Hinds County did not abuse its discretion in granting the Secretary of State's motion to transfer venue to the Chancery Court of Rankin County because suits to confirm title to real property had to be brought in the county where the land was located; and the property was located in Rankin County. Green Hills Dev. Co., LLC v. Sec'y of State, — So. 3d —, 2019 Miss. LEXIS 254 (Miss. July 18, 2019).

Where, in a suit to enjoin the defendants from foreclosing a deed of trust and to cancel such deed of trust as a cloud upon complainants' title, title to that part of the land covered by the deed of trust situated in the county in which the suit was brought had, at the time suit was brought, matured in the state under tax sales, and the defendants moved to dismiss the suit because the court had no territorial jurisdiction in that the rest of the land was situated in another county, but the suit was dismissed on another ground urged in such motion, defendants' failure on complainants' appeal from dismissal to urge the point that suit could not be maintained other than that in which it was situated, constituted waiver of the point. Ravesies v. Martin, 190 Miss. 92, 199 So. 282, 1940 Miss. LEXIS 191 (Miss. 1940).

A suit to cancel a claim against land as a cloud upon the title, where the property is in possession of the complainant and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely in rem in the sense that a court would be wholly without jurisdiction in a county other than where the land is situated. Ravesies v. Martin, 190 Miss. 92, 199 So. 282, 1940 Miss. LEXIS 191 (Miss. 1940).

3. Other suits involving real or personal property.

Venue was not jurisdictional a brother's action to set aside a deed to the family farm from their mother to a revocable trust, and the sister waived any objection to the suit being heard in the county because the venue issue was never pursued to a ruling in the chancery court. Hodnett v. Hodnett, 269 So. 3d 317, 2018 Miss. App. LEXIS 189 (Miss. Ct. App.), cert. denied, 258 So. 3d 287, 2018 Miss. LEXIS 527 (Miss. 2018).

Where the insurer alleged that the insured committed insurance fraud, the insured's assertion that it was an in personam action, with venue in the county where the insured resided, was rejected; the specific terms of Miss. Code Ann. § 11-5-1 regarding venue for real and personal property actions, prevailed over the general terms of Miss. Code Ann. § 11-11-3, which placed venue generally in the county of the defendant's residence, thus, venue was properly in the county of the insurer's office where the certificates were issued, and from where the claims were paid. Guice v. Miss. Life Ins. Co., 836 So. 2d 756, 2003 Miss. LEXIS 56 (Miss. 2003).

Trial court did not err in failing to grant defendant's motion to transfer venue or for change of venue where debtors on mortgage were domiciled in county where property secured by deed of trust was located, but action was brought in different county; notes given by debtors on their face were payable in county where action was brought, and under § 75-3-504, where negotiable instrument is payable in two places, holder has option to present it at either and is not under obligation to notify maker at which of places demand will be made. Haygood v. First Nat'l Bank, 517 So. 2d 553, 1987 Miss. LEXIS 2923 (Miss. 1987).

In an action to set aside an allegedly fraudulent conveyance of personal property, venue was in the county in which the property was located since the specific terms of Code 1972, § 11-5-1 prevail over the general terms of Code 1972, § 11-11-3. Green v. Winona Elevator Co., 319 So. 2d 224, 1975 Miss. LEXIS 1475 (Miss. 1975).

In a bill to recover a commission for producing a purchaser for real property owned by defendants and sold to a codefendant, and for an amount expended for authorized repairs, where the property lay in Jackson County, and the alleged contract of sale was made in that county and an alleged fraud occurred therein, the chancery court of the county had jurisdiction over the subject matter; and when the defendants entered their appearances, the court acquired jurisdiction of the parties. Arndt v. Turner, 230 Miss. 294, 92 So. 2d 875, 1957 Miss. LEXIS 371 (Miss. 1957).

In a proceeding upon attachment in chancery to recover for injuries received and to attach nonresident corporate defendant's funds and property at the hands of Mississippi corporation which operated a motor transportation line in Winston County and a person residing in Choctaw County, although another defendant resided in Hinds County, venue was properly laid in Winston County. Continental Southern Lines, Inc. v. Wicker, 217 Miss. 856, 65 So. 2d 272, 1953 Miss. LEXIS 501 (Miss. 1953).

A purchaser under an executory contract for sale and purchase of land is entitled to equitable lien upon the land for amount which he has paid on purchase price, where the vendor failed to make good title within time required by contract, and the purchaser could maintain a suit in chancery court of the county in which the farm was located to impose an equitable lien. Cole v. Haynes, 216 Miss. 485, 62 So. 2d 779, 1953 Miss. LEXIS 659 (Miss. 1953).

Suit to enjoin drainage into streams so as to cause overflow of lower land maintainable in county in which such land is situated. Board of Drainage Comm'rs v. Board of Drainage Comm'rs, 130 Miss. 764, 95 So. 75, 1922 Miss. LEXIS 253 (Miss. 1922).

A bill by a judgment-debtor, seeking to enjoin the enforcement of the judgment, and to recover from the sheriff the possession of the property levied on, is a suit respecting real or personal property, and may be filed in the county where the property is. Boswell v. Wheat, 37 Miss. 610, 1859 Miss. LEXIS 58 (Miss. 1859).

4. Suits involving executors, etc.

This section contains no provision for a compulsory change of venue where an executor is sued along with another defendant in some county other than that in which the will was admitted to probate. Myers v. Vinson, 212 Miss. 85, 54 So. 2d 168, 1951 Miss. LEXIS 430 (Miss. 1951).

Chancery court of county in which nonexempt land of decedent is located does not have jurisdiction of bill by creditor seeking lien against land for payment of his claims, when decedent's estate is in process of administration in another county. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

No court other than chancery court in which letters of administration has been granted has jurisdiction over petition for sale of decedent's nonexempt lands for payment of decedent's debts. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

Jurisdiction of all demands by creditors or others against an estate of a decedent is vested in chancery court of county in which letters of administration are granted. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

An action to charge administratrix, and her sureties, for devastation of a deceased war veteran's estate, consisting of the proceeds of war risk insurance and adjusted compensation, and also to charge the chancery clerk of Choctaw County for his negligent loss of one of the bonds securing the proper administration of the estate, was properly brought in Choctaw County where the administration of the estate was in such county and one of the defendants was the chancery clerk thereof. Hill v. Ouzts, 190 Miss. 341, 200 So. 254, 1941 Miss. LEXIS 54 (Miss. 1941).

Suit on bond of executor appointed in Tennessee to pay over money converted in Mississippi to be administered in accordance with laws of Tennessee was maintainable in Mississippi. Cutrer v. Tennessee, 98 Miss. 841, 54 So. 434, 1910 Miss. LEXIS 132 (Miss. 1910).

Courts of this state have jurisdiction of suit by creditors on executrix's bond for concealing assets, though executrix resides in Alabama, where administration is undertaken in Mississippi, executrix resided here at decedent's death, the assets have their situs here, and her surety resides here. Myers v. Martinez, 95 Miss. 104, 48 So. 291, 1909 Miss. LEXIS 206 (Miss. 1909).

5. Venue where defendant resides or is found.

The chancery court of Hinds County should have transferred a separate maintenance suit to the Rankin County chancery court, even though the defendant was temporarily residing in Hinds County where he was found for the service of process, where the defendant owned a home in Rankin County which he still considered to be his residence, he was registered to vote and did vote in Rankin County, and he had a homestead exemption on a home in Rankin County; the mere fact that the defendant was not actually present in his home did not mean that it was not his residence. Dunn v. Dunn, 577 So. 2d 378, 1991 Miss. LEXIS 117 (Miss. 1991).

Decision by chancery court in Walthall County that reversed Medicaid's decision denying a claimant nursing home benefits was reversed on appeal, where venue was improper in Walthall County; venue was proper in Hinds County, the seat of state government. Office of the Governor Div. of Medicaid v. Johnson, 950 So. 2d 1033, 2006 Miss. App. LEXIS 747 (Miss. Ct. App. 2006).

Putative father sued for support in both maternity proceeding under § 93-9-17 and support proceeding under § 43-19-33 has right to have cause heard in county in which he resides, if he is resident of state of Mississippi; defendant must timely assert right to venue in county of residence via Rule 12(b)(3) motion, and failure to do so amounts to waiver. Belk v. State Dep't of Public Welfare, 473 So. 2d 447, 1985 Miss. LEXIS 2179 (Miss. 1985).

In an action for an injunction and the recovery of damages against multiple defendants who had engaged in an economic boycott against plaintiffs' businesses, the chancery court did not err in refusing to grant a change of venue from Hinds County to Claiborne County where at least three of the defendants "resided" in the First Judicial District of Hinds County. NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1980 Miss. LEXIS 2174 (Miss. 1980), amended, 405 So. 2d 115, 1981 Miss. LEXIS 2244 (Miss. 1981), rev'd, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215, 1982 U.S. LEXIS 49 (U.S. 1982).

A suit for alimony pendente lite, separate maintenance, and attorneys' fees which was brought in Tate County, the residence of the wife, should have been transferred to the chancery court of Alcorn County where the evidence established that the latter county was the residence of the husband, and the husband had made timely objection to the venue. Trainum v. Trainum, 234 Miss. 448, 105 So. 2d 628, 1958 Miss. LEXIS 516 (Miss. 1958).

Wife's separate maintenance suit should be brought in county of which husband is resident. Trainum v. Trainum, 234 Miss. 448, 105 So. 2d 628, 1958 Miss. LEXIS 516 (Miss. 1958).

In an action to recover damages for alleged tort against a sheriff (a nonresident of the county), his surety, a nonresident corporation, and certain resident garnishee defendants, the defendants were entitled to have the venue changed to the county of the sheriff's residence, in view of the statute providing for the change of venue of an action against a public officer to the county of his residence upon his application, notwithstanding another provision that "all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be bound." Holyfield v. State, 194 Miss. 91, 10 So. 2d 841, 1942 Miss. LEXIS 165 (Miss. 1942).

A cause of action to recover for usurious interest charges, forfeiture of principal, and an accounting for the price of cotton produced by plaintiff's assignors accrued in the county in which suit was brought by reason of the fact that some of plaintiff's assignors were tenants of a defendant's plantation situated in that county, but that did not give the chancery court of such county jurisdiction where the defendant in question did not reside or could not be found therein, since under this section [Code 1942, § 1274], in cases of this character, the venue was in the county where a necessary party defendant might reside or be found. McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847, 1940 Miss. LEXIS 211 (Miss. 1940).

Suit against nonresidents temporarily engaged in road construction in state must be brought in county where road being constructed and where process served on three of them, although purchase-money notes for trucks sold two defendants were payable in another county. Brashier v. J. C. O'Connor & Sons, 181 Miss. 872, 180 So. 67, 1938 Miss. LEXIS 126 (Miss. 1938).

Chancery court had jurisdiction over nonresident stockholder who was made party defendant to suit by superintendent of banks against all stockholders of bank to recover statutory liability from stockholders, in absence of contention that none of stockholders resided in county where suit was brought. Anderson v. Love, 169 Miss. 219, 151 So. 366, 153 So. 369, 1933 Miss. LEXIS 8 (Miss. 1933), set aside, 169 Miss. 237, 153 So. 369 (Miss. 1934).

Attachment suit against nonresidents brought in county of any necessary defendants as authorized by statute does not unconstitutionally discriminate against any necessary defendant. Clark v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

Statute fixing venue in action against railroad in any county in which line of railroad runs is applicable only when railroad is sued alone; suit against two or more railroads as necessary defendants or against several defendants living in separate counties falls under provisions of general venue statutes. Clark v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

Where divorce decree granted in H. County did not provide for child's maintenance, chancery court of another county, where divorced husband resided, had jurisdiction of suit for moneys expended for child's maintenance, etc. Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 1929 Miss. LEXIS 344 (Miss. 1929).

A bill to foreclose a deed of trust may be filed in the chancery court where the trustee resides, although the property and all other defendants reside elsewhere. Moyse v. Cohn, 76 Miss. 590, 25 So. 169, 1898 Miss. LEXIS 134 (Miss. 1898).

A bill by the pledgor of a promissory note against the mortgagor and pledgee may be filed in the chancery court of the county in which the pledgee resides. Baker v. Burkett, 75 Miss. 89, 21 So. 970, 1897 Miss. LEXIS 102 (Miss. 1897).

A purchaser of land situated in another state can maintain a bill in the chancery court of the county of this state where his vendor resides to enforce the warranty of title and obtain reimbursement for expenditures in resisting a suit and extinguish-ing a paramount title. Oliver v. Loye, 59 Miss. 320, 1881 Miss. LEXIS 124 (Miss. 1881), limited, Jackson v. Wallace, 189 Miss. 252, 196 So. 223, 1940 Miss. LEXIS 104 (Miss. 1940).

6. —Necessary party defendant.

In an attachment proceeding in chancery against a nonresident defendant, the presence of a resident defendant, who was alleged to have in his possession property of such nonresident defendant, was absolutely necessary to enable the complainant to proceed with her suit and to realize on any decree in her favor. Gulf Refining Co. v. Mauney, 191 Miss. 526, 3 So. 2d 844, 1941 Miss. LEXIS 172 (Miss. 1941).

Where, at the time of filing an action to recover for alleged usurious interest charges, forfeiture of principal, and for an accounting for the price of cotton produced by the plaintiff's assignor, there was an agreement that one of the defendants, residing in the county in which suit was brought, would not be heard by the suit, he was not a necessary party and the chancery court was warranted in dismissing the suit as to all defendants for want of a necessary party residing in that county, it being immaterial what consideration induced the agreement. McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847, 1940 Miss. LEXIS 211 (Miss. 1940).

Superintendent of banks could join all bank stockholders in suit in equity to recover statutory liability from stockholders who were all proper parties thereto. Anderson v. Love, 169 Miss. 219, 151 So. 366, 153 So. 369, 1933 Miss. LEXIS 8 (Miss. 1933), set aside, 169 Miss. 237, 153 So. 369 (Miss. 1934).

Seller's agent not accounting for receipts held not necessary party to seller's action against buyer for balance due for sheep sold, as regards venue. Burgin v. Smith, 163 Miss. 797, 141 So. 760, 1932 Miss. LEXIS 88 (Miss. 1932).

RESEARCH REFERENCES

ALR.

Venue of suit to enjoin nuisance. 7 A.L.R.2d 481.

Relationship between "residence" and "domicil" under venue statutes. 12 A.L.R.2d 757.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Place of personal representative's appointment as venue of action against him in his official capacity. 93 A.L.R.2d 1199.

Am. Jur.

27A Am. Jur. 2d, Equity §§ 38, 39, 108, 114.

20A Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 25.1 (Complaint, petition, or declaration – To remove cloud on title – To enjoin construction of edifice until boundary dispute determined).

CJS.

30A C.J.S., Equity §§ 84-99, 129.

Lawyers' Edition.

State venue provisions for civil actions as violating equal protection clause of Federal Constitution's Fourteenth Amendment – Supreme court cases. 119 L. Ed. 2d 665.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi – Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

§ 11-5-3. Issue may be tried by a jury.

The chancery court, in a controversy pending before it, and necessary and proper to be tried by a jury, shall cause the issue to be thus tried to be made up in writing. The jury shall be drawn in open court from the jury box used in the circuit court, in the presence of the clerk of the circuit court who shall attend with the box for that purpose. The number drawn shall not exceed twenty, and the slips containing the names shall be returned to the box. The clerk of the chancery court shall issue the venire facias to the sheriff, returnable as the court shall direct. If there be no jury box the jury may be obtained as provided for in the circuit court in such case. The sheriff and jurors, for failure to perform duty or to attend, shall be liable to like penalty as in the circuit court. The parties shall have the same right of challenge as in trials in the circuit court, and the jury may be completed in the same manner. The chancellor may instruct the jury in the same way that juries are instructed in the circuit court, and the parties shall have the same rights in respect thereto; the instructions shall be filed in the cause and become a part of the record, and the chancellor shall sign bills of exceptions as in the circuit court, and the court may grant new trials in proper cases.

HISTORY: Codes, 1880, § 1836; 1892, § 507; 1906, § 558; Hemingway's 1917, § 318; 1930, § 364; 1942, § 1275.

Cross References — Questions of negligence for the jury, see § 11-7-17.

Instructions to jury in civil cases, see § 11-7-155.

Juries, generally, see §§ 13-5-1 et seq.

The rules governing the examination, selection of, and challenges to jurors, and for those covering jury instructions, see Miss. R. Civ. P. 47, 48, 51.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Discretion of court.
3. Questions on appeal.

1. In general.

Where legislature adopted the construction placed upon this section by Supreme Court by re-enacting it, such construction is binding on Supreme Court. Griffin v. Jones, 170 Miss. 230, 154 So. 551, 1934 Miss. LEXIS 126 (Miss. 1934).

Circuit court clerk is custodian of the jury box and must place therein slips containing jurors' names in accordance with list furnished him. Nelson v. State, 160 Miss. 401, 133 So. 248, 1931 Miss. LEXIS 159 (Miss. 1931).

Laws 1910 ch. 134 giving chancery courts concurrent jurisdiction of suits for penalty for violation thereof does not violate Const. 1890 §§ 26, 31, since, under this section (§ 558, Code 1906), the chancellor is empowered to award a jury trial when needed. State ex rel. Attorney Gen. v. Marshall, 100 Miss. 626, 56 So. 792, 1911 Miss. LEXIS 64 (Miss. 1911).

2. Discretion of court.

Under Code 1972 § 11-5-3, § 91-7-23, and § 91-7-29, prescribing will contest procedures, trial judge erred in directing verdict in favor of proponents of will on issue of testamentary capacity and undue influence, since roll of jury in will contest is same as that of jury in civil trial in court of law and is not "merely advisory." Fowler v. Fisher, 353 So. 2d 497, 1977 Miss. LEXIS 2002 (Miss. 1977).

In litigation, growing out of death and injuries sustained in a collision of two automobiles, filed in the chancery court in the county where letters of administration on the decedent's estates were issued, complainants charged that the accident was due to the negligence of a construction company, through its agent, in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who allegedly was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, where upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of Mississippi Constitution § 147, and while the chancery court in his discretion might have directed the trial of the case by jury, error could not be predicated upon the refusal of a jury trial. Mathews v. Thompson, 231 Miss. 258, 95 So. 2d 438, 1957 Miss. LEXIS 512 (Miss. 1957).

Under this section, the court was authorized in its discretion to allow the jury to try the issue involving conflicting claims to realty, but since the granting of a jury trial is wholly discretionary, the court may disregard the finding of the jury when made. Laub v. Reason, 217 Miss. 475, 64 So. 2d 637, 1953 Miss. LEXIS 454 (Miss. 1953).

In suit for partition where cross-bill denied complainant's title a jury trial is within the discretion of the court. Bland v. Bland, 105 Miss. 478, 62 So. 641, 1913 Miss. LEXIS 233 (Miss. 1913).

In suit by trustee in bankruptcy for an accounting to recover preferences whether the issues shall be submitted to a jury is within the discretion of the court. Carradine v. Estate of Carradine, 58 Miss. 286, 1880 Miss. LEXIS 123 (Miss. 1880); First State Bank v. Lincoln, 97 Miss. 720, 53 So. 387, 1910 Miss. LEXIS 292 (Miss. 1910).

3. Questions on appeal.

Neither chancellor nor jury have an arbitrary right to disregard testimony which is neither inconsistent with laws of nature nor contradicted either by direct or circumstantial evidence. Ryals v. Douglas, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

In determining question whether trial court erred in granting appellee's peremptory instruction, it being urged that there was evidence on which jury might have rendered adverse verdict, question presented is whether decree of chancellor was correct irrespective of jury and as if no jury had been present. Griffin v. Jones, 170 Miss. 230, 154 So. 551, 1934 Miss. LEXIS 126 (Miss. 1934).

Where chancellor approves jury verdict by rendering judgment thereon Supreme Court will not reverse for misdirection of jury unless the facts do not support the verdict, or the chancellor misconceived the law. Studdard v. Carter, 120 Miss. 246, 82 So. 70, 1919 Miss. LEXIS 81 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Right in equity suit to jury trial of counterclaim involving legal issue. 17 A.L.R.3d 1321.

Prospective juror's connection with insurance company as ground for challenge for cause. 9 A.L.R.5th 102.

Am. Jur.

27A Am. Jur. 2d, Equity §§ 168- 172, 187.

§ 11-5-5. Change of venue in jury cases allowed.

The chancery court may award a change of venue for the trial of all issues to be tried by a jury pursuant to the procedure provided for in the Mississippi Rules of Civil Procedure. The clerk of the court from which the issue is to be removed, and the clerk of the court to which it is removed, respectively, shall, upon an order for a change of venue, discharge the duties directed to be performed by the clerks of circuit courts in such cases; and in such case the chancery court to which the venue is changed shall try the issue by a jury, and shall proceed and render decrees and finally dispose of the cause as if the suit had begun therein.

HISTORY: Codes, 1880, § 1837; 1892, § 508; 1906, § 559; Hemingway's 1917, § 319; 1930, § 365; 1942, § 1276; Laws, 1991, ch. 573, § 17, eff from and after July 1, 1991.

Cross References — Change of venue generally, see §§ 11-11-51 et seq.
Rule governing change of venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

A party waived his right to raise the defense of improper venue when he failed to include that defense with his initial Motion to Quash and Set Aside and extended to the court the authority to hear the Motion to Quash without raising the defense of improper venue. Lowrey v. Last Will & Testament of Smith, 543 So. 2d 1155, 1989 Miss. LEXIS 185 (Miss. 1989).

Provision that chancery court to which venue is changed shall try the issue by jury is mandatory. Humphreys County v. Cashin, 128 Miss. 236, 90 So. 888, 1922 Miss. LEXIS 106 (Miss. 1922).

RESEARCH REFERENCES

ALR.

Construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and ends of justice. 74 A.L.R.2d 16.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Am. Jur.

77 Am. Jur. 2d, Venue §§ 42, 44 et seq.

CJS.

92A C.J.S., Venue §§ 118-132.

§§ 11-5-7 through 11-5-29. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-5-7. [Codes, 1857, ch. 62, art. 53; 1871, § 1032; 1880, §§ 1861, 1862; 1892, §§ 521, 522; 1906, §§ 572, 573; Hemingway's 1917, §§ 332, 333; 1930, § 368; 1942, § 1279]

§ 11-5-9. [Codes, 1880, § 1865; 1892, § 525; 1906, § 576; Hemingway's 1917, § 336; 1930, § 369; 1942, § 1280]

§ 11-5-11. [Codes, Hutchinson's 1848, ch. 54, art. 7; 1857, ch. 62, art. 35; 1871, § 1069; 1880, §§ 1858, 1866, 1867; 1892, §§ 518, 526; 1906, §§ 569, 577; Hemingway's 1917, §§ 329, 337; 1930, § 372; 1942, § 1283]

§ 11-5-13. [Codes, 1880, § 1869; 1892, § 527; 1906, § 578; Hemingway's 1917, § 338; 1930, § 373; 1942, § 1284]

§ 11-5-15. [Codes, 1880, § 1869; 1892, § 528; 1906, § 579; Hemingway's 1917, § 339; 1930, § 374; 1942, § 1285]

§ 11-5-17. [Codes, 1857, ch. 62, art. 39; 1871, § 1021; 1880, § 1889; 1892, § 549; 1906, § 600; Hemingway's 1917, § 360; 1930, § 375; 1942, § 1286; Laws, 1924, ch. 151; Laws, 1942, ch. 299]

§ 11-5-19. [Codes, 1871, § 1017; 1880, § 1870; 1892, § 530; 1906, § 581; Hemingway's 1917, § 341; 1930, § 376; 1942, § 1287]

§ 11-5-21. [Codes, 1871, § 1018; 1880, § 1871; 1892, § 531; 1906, § 582; Hemingway's 1917, § 342; 1930, § 377; 1942, § 1288]

§ 11-5-23. [Codes, 1930, § 378; 1942, § 1289; Laws, 1924, ch. 151]

§ 11-5-25. [Codes, 1930, § 379; 1942, § 1290; Laws, 1924, ch. 151]

§ 11-5-27. [Codes, 1857, ch. 62, arts. 44, 45; 1871, §§ 1016, 1024; 1880, §§ 1873, 1892; 1892, § 533; 1906, § 584; Hemingway's 1917 § 344; 1930, § 380; 1942, § 1291; Laws, 1962, ch. 284]

§ 11-5-29. [Codes, 1880, § 1874; 1892, § 534; 1906, § 585; Hemingway's 1917, § 345; 1930, § 381; 1942, § 1292]

Editor's Notes — Former § 11-5-7 specified the application of rules specified in this chapter.

Former § 11-5-9 provided that all pleadings shall be subscribed by the party or his solicitor.

Former § 11-5-11 specified what the address of bills and petitions, and what the introduction should be.

Former § 11-5-13 specified what the bill must contain.

Former § 11-5-15 provided that exhibits filed with a bill would be considered as if copied in the bill.

Former § 11-5-17 specified when a defendant was to answer or demur.

Former § 11-5-19 provided a form of demurrers.

Former § 11-5-21 provided that a demurrer must have attached the solicitor's certificate that he believes it ought to be sustained.

Former § 11-5-23 specified the legal sufficiency of a bill or petition questioned by answer or demurrer, and provided for a vacation hearing on a demurrer.

Former § 11-5-25 abolished pleas in chancery, required every defense to be made in the answer, and provided for a separate hearing on a plea set up in the answer, if warranted.

Former § 11-5-27 required the defendant to answer all allegations and provided that a denial by reference to a designated paragraph was a sufficient denial.

Former § 11-5-29 required that the answer be sworn to unless such requirement was waived, and specified how a corporation should answer.

§ 11-5-31. Before whom answers of nonresidents may be sworn.

Answers of defendants out of the state may be sworn to before any commissioner for this state, or any judge, chancellor, or any justice of the peace, notary public, or the mayor or alderman of any city or town, or clerk of a court of record, in the state or country where such defendant may be, if such officer shall be authorized to administer oaths by the law of such state or country; and the certificate of such officer as to his official character, shall be prima facie evidence thereof.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 12 (3); 1857, ch. 62, art. 50; 1871, § 1087; 1880, § 1949; 1892, § 535; 1906, § 586; Hemingway's 1917, § 350; 1930, § 382; 1942, § 1293.

Editor's Notes — Pursuant to Miss. Constn., § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Rules abolishing technical forms of pleading, eliminating the two witness rule, and allowing answer without oath, see Miss. R. Civ. P. 8, 11.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

§§ 11-5-33 through 11-5-47. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-5-33. [Codes, Hutchinson's 1848, ch. 54, art. 12(6); 1857, ch. 62, art. 94; 1871, § 1087; 1880, § 1949; 1892, § 535; 1906, § 586; Hemingway's 1917, § 346; 1930, § 383; 1942, § 1294]

§ 11-5-35. [Codes, 1880, § 1938; 1892, § 529; 1906, § 580; Hemingway's 1917, § 340; 1930, § 384; 1942, § 1295]

§ 11-5-37. [Codes, Hutchinson's 1848, ch. 54, art. 12(1); 1857, ch. 62, art. 51; 1871, § 1030; 1880, § 1875; 1892, § 536; 1906, § 587; Hemingway's 1917, § 347; 1930, § 385; 1942, § 1296]

§ 11-5-39. [Codes, 1871, § 1066; 1880, § 1876; 1892, § 537; 1906, § 588; Hemingway's 1917, § 348; 1930, § 386; 1942, § 1297]

§ 11-5-41. [Codes, 1871, § 1067; 1880, § 1877; 1892, § 538; 1906, § 589; Hemingway's 1917, § 349; 1930, § 387; 1942, § 1298]

§ 11-5-43. [Codes, 1857, ch. 62, art. 43; 1871, § 1019; § 1880, § 1879; 1892, § 540; 1906, § 591; Hemingway's 1917, § 351; 1930, § 388; 1942, § 1299]

§ 11-5-45. [Codes, 1857, ch. 62, art. 47; 1871, § 1026; 1880, § 1891; 1892, § 551; 1906, § 602; Hemingway's 1917, § 362; 1930, § 389; 1942, § 1300; Laws, 1924, ch. 151]

§ 11-5-47. [Codes, 1857, ch. 62, art. 40; 1871, § 1022; 1880, § 1890; 1892, § 550; 1906, § 601; Hemingway's 1917, § 361; 1930, § 390; 1942, § 1301; Laws, 1924, ch. 151.]

Editor's Notes — Former § 11-5-33 abolished the rule requiring two witnesses to overthrow an answer.

Former § 11-5-35 provided that exhibits could be proved by affidavits or witnesses.

Former § 11-5-37 authorized making an answer a cross-bill against a complainant or codefendant.

Former § 11-5-39 authorized a complainant to obtain an order of attachment to compel the defendant to answer when defendant fails to answer.

Former § 11-5-41 required the imprisonment of a defendant who refused to answer after an attachment for the purpose of coercing an answer.

Former § 11-5-43 provided that a replication to an answer was not required, but that the cause would be at issue when the answer was filed.

Former § 11-5-45 abolished exceptions to bills and answers, and provided for objections by motion, motions to strike and amendments to bills and answers.

Former § 11-5-47 authorized an agreement between parties for additional time to answer or demur, provided that a solicitor, once authorized, was authorized until written notice of termination of authority was given.

§ 11-5-49. Answer not required in certain cases.

In proceedings in matters testamentary and of administration, in minors' business, and in cases of persons with an intellectual disability, persons with mental illness and persons of unsound mind, as provided for by law, no answer shall be required to any petition or application of any sort. Such a petition or application shall not be taken as confessed because of the lack of an answer, but every petition, application, or account shall be supported by the proper evidence and may be contested without an answer. All such proceedings shall be as summary, as the statutes authorizing and regulating them contemplate; however, when either of the parties having a controversy in court as to any of those several matters requires and the court sees proper, it may direct plenary proceedings by bill or petition, to which there shall be an answer on oath or affirmation. If an adult or sane party refuses to answer as to any matter alleged in the bill or petition and proper for the court to decide upon, the party refusing may be attached, fined, and imprisoned at the discretion of the court, and the matter set forth in the bill or petition shall be taken as confessed and a decree shall be made accordingly.

HISTORY: Codes, 1860, § 1863; 1892, § 523; 1906, § 574; Hemingway's 1917, § 334; 1930, § 370; 1942, § 1281; Laws, 2008, ch. 442, § 4; Laws, 2010, ch. 476, § 4, eff from and after passage (approved Apr. 1, 2010.).

Cross References — Preservation of summary proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Matters testamentary and of administration.
3. Minors' business.

1. In general.

Under this section [Code 1942, § 1281] adherence to the strict rules of pleading is not required in proceedings in matters testamentary and of administration. Duling v. Duling's Estate, 211 Miss. 465, 52 So. 2d 39, 1951 Miss. LEXIS 378 (Miss. 1951).

Affirmative averments, in an answer, even though it be under oath, are not evidence and must be proved, aliunde the answer. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

In matters testamentary and of administration no answers under oath are required, whether waived or not. Lindeman's Estate v. Herbert, 188 Miss. 842, 193 So. 790, 1940 Miss. LEXIS 13 (Miss. 1940).

2. Matters testamentary and of administration.

Petitions, one by intestate's widow claiming the proceeds of certain personalty sold by order of the court, and another by the intestate's daughters praying that the property be established as part of the assets of the estate, were matters in the course of the administration of the estate and neither required any answer; accordingly, failure of intestate's daughters to waive oaths to the widow's answer to their petition, and her oath to it, should have had no weight in the chancellor's adjudication of the issues. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

Although it appeared in a contest between residuary legatees, seeking to compel the inclusion of certain corporate stock in the assets of testatrix's estate, and certain persons claiming such stock as being a gift inter vivos that the residuary legatee filed a pleading to the answer of the executor which was sworn to by positive oath containing a positive and unequivocal allegation that the stock in controversy was not assigned, transferred, conveyed or delivered to the alleged donee thereof during the lifetime of the testatrix, and the answer of the ultimate beneficiaries of the alleged gift in such pleading was also sworn to, the answers were entitled to be given only such weight and credit as in view of the interests of the parties making the same, and the other circumstances of the case, it might be fairly entitled to, since in matters testamentary and of administration no answers under oath were required, whether waived or not. Lindeman's Estate v. Herbert, 188 Miss. 842, 193 So. 790, 1940 Miss. LEXIS 13 (Miss. 1940).

Administrator petitioning for authority to sell land to pay debts had burden of proving that the land was such an asset of the estate as the court could order sold for that purpose. Robinson v. Martin, 103 Miss. 733, 60 So. 769, 1912 Miss. LEXIS 223 (Miss. 1912).

3. Minors' business.

The court is under the duty to see that the interest of the minor is properly presented, and has power to require any amendment or specific proceeding to be filed as it may deem necessary for the ascertainment of the truth. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

In inquiring into accounts of guardians, the court is not controlled by strict technical rules; and it should inquire into the matter and look after the interest of the minor even though that interest is not set forth with technical precision in the pleading. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

RESEARCH REFERENCES

ALR.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment. 73 A.L.R.3d 1250.

Am. Jur.

27A Am. Jur. 2d, Equity § 121.

61A Am. Jur. 2d, Pleading §§ 108, 110-112, 114.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue-Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

§ 11-5-51. Answer or demurrer may be filed where answer not required.

Where an answer is not necessary in the matters mentioned in Section 11-5-49, anyone desiring to contest any petition or application may file an answer, or may demur to any petition, and in that way test its sufficiency.

HISTORY: Codes, 1880, § 1864; 1892, § 524; 1906, § 575; Hemingway's 1917, § 335; 1930, § 371; 1942, § 1282.

Cross References — Construction of the term "demurrer", as well as other terms, when used in a statute, see Miss. R. Civ. P. 81.

Filing of pleadings before presentation, see Miss. Uniform Chancery Court Rule 2.02.

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity §§ 121, 122.

61A Am. Jur. 2d, Pleading §§ 187- 191, 208- 268.

§§ 11-5-53 through 11-5-73. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-5-53. [Codes, 1857, ch. 62, art. 49; 1871, § 1028; 1880, § 1881; 1892, § 542; 1906, § 593; Hemingway's 1917, § 353; 1930, § 391; 1942, § 1302]

§ 11-5-55. [Codes, 1880, § 1885; 1892, § 546; 1906, § 597; Hemingway's 1917, § 357; 1930, § 392; 1942, § 1303]

§ 11-5-57. [Codes, 1880, § 1882; 1892, § 543; 1906, § 594; Hemingway's 1917, § 354; 1930, § 393; 1942, § 1304]

§ 11-5-59. [Codes, 1880, § 1883; 1892, § 544; 1906, § 595; Hemingway's 1917, § 355; 1930, § 394; 1942, § 1305; Laws, 1924, ch. 151]

§ 11-5-61. [Codes, 1880, § 1884; 1892, § 545; 1906, § 596; Hemingway's 1917, § 356; 1930, § 395; 1942, § 1306]

§ 11-5-63. [Codes, 1880, §§ 1886, 1887; 1892, § 547; 1906, § 598; Hemingway's 1917, § 358; 1930, § 396; 1942, § 1307]

§ 11-5-65. [Codes, 1880, § 1888; 1892, § 548; 1906, § 599; Hemingway's 1917, § 359; 1930, § 397; 1942, § 1308]

§ 11-5-67. [Codes, 1930, § 399; 1942, § 1310; Laws, 1924, ch. 151; Laws, 1950, ch. 341, §§ 1-3]

§ 11-5-69. [Codes, 1880, §§ 1950, 1951; 1892, § 1764; 1906, § 1941; Hemingway's 1917, § 1601; 1930, § 400; 1942, § 1311; Laws, 1904, ch. 148; Laws, 1916, ch. 220]

§ 11-5-71. [Codes, 1942, § 1312; Laws, 1938, ch. 265]

§ 11-5-73. [Codes, 1880, § 1895; 1892, § 555; 1906, § 606; Hemingway's 1917, § 366; 1930, § 401; 1942, § 1313]

Editor's Notes — Former § 11-5-53 provided that amendments to pleadings and proceedings would be allowed on liberal terms.

Former § 11-5-55 authorized a complainant to file an amended bill to make new parties in vacation, without leave of court.

Former § 11-5-57 specified when a complainant could amend his bill without leave of the court.

Former § 11-5-59 specified the amount of time provided to answer an amended bill or petition.

Former § 11-5-61 specified how amendments of bill and answers were to be made.

Former § 11-5-63 related to demurrer for multifariousness.

Former § 11-5-65 provided that an objection for misjoinder of parties taken at the hearing could not be considered, and directed the court to decree upon the merits.

Former § 11-5-67 specified when causes were triable.

Former § 11-5-69 specified the methods of adducing testimony and examining witnesses.

Former § 11-5-71 authorized the defendant to introduce evidence even though defendant's motion to exclude complainant's evidence was overruled.

Former § 11-5-73 related to bills of exceptions.

§ 11-5-75. Creditors may attack fraudulent conveyances.

The chancery court shall have jurisdiction of causes of action filed under the Uniform Fraudulent Transfer Act. Upon such a complaint, a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs; and the chancellor of the proper district shall have power and authority to grant orders for receivers, in same manner as if the creditor had recovered judgment and had execution returned "no property found." The creditor in such case shall have a lien upon the property described therein from the filing of his complaint, except as against bona fide purchasers before the service of process upon the defendant in the complaint.

HISTORY: Codes, 1880, §§ 1843, 1844, 1845; 1892, § 503; 1906, § 553; Hemingway's 1917, § 1313; 1930, § 407; 1942, § 1327; Laws, 1898, ch. 64; Laws, 2006, ch. 371, § 12, eff from and after July 1, 2006.

Cross References — Attachment in chancery against nonresident, absent or absconding debtors, see § 11-31-1 et seq.

Fraudulent transfers and conveyances, see §§ 15-3-101 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Purpose.
3. Construction with other laws.
4. Jurisdiction.
5. Enforcement in Federal court.
6. Right and propriety of action.
7. Persons entitled to attack challenge, etc.
8. Transactions subject to challenge.
9. Pleading.
10. Proof.
11. Liens; priority of liens.
12. Rights of purchasers.
13. Effect of bankruptcy.

1. In general.

The deed of an insolvent corporation, or of a corporation rendered insolvent by reason of its execution, by which it undertook to convey substantially all of its assets to persons who were all of its officers, directors, and stockholders is void; for insiders cannot prefer themselves in payment of pre-existing debts and thus deprive other creditors of the corporation of their claims; and such creditors had a lien upon the assets of the corporation superior to that of a mortgagee which held a deed of trust executed by the corporation's grantees as to all property not covered by prior deeds of trust executed by the corporation. Cooper v. Mississippi Land Co., 220 So. 2d 302, 1969 Miss. LEXIS 1451 (Miss. 1969).

A director of a corporation occupies a fiduciary position toward creditors, having a better knowledge of the condition of the company than have other creditors, and should not be permitted to use that position to benefit himself at their expense or to grant himself preferences or advantages in the payment of his claims over other creditors. Cooper v. Mississippi Land Co., 220 So. 2d 302, 1969 Miss. LEXIS 1451 (Miss. 1969).

A mortgagee with actual or imputed knowledge of a fraudulent transaction cannot defeat the claims of creditors. Cooper v. Mississippi Land Co., 220 So. 2d 302, 1969 Miss. LEXIS 1451 (Miss. 1969).

Where a client who was contesting a will devised land to the devisees' grantee, which settled litigation, this was not a fraudulent conveyance as to the client's attorneys who were employed under a contingent fee contract. Pollard v. Joseph, 210 Miss. 828, 50 So. 2d 546, 1951 Miss. LEXIS 319 (Miss. 1951).

In an attachment suit to establish a lien on realty for damages against nonresident for breach of warranty, chancellor's decree that conveyance of the land from the defendant to his wife was fraudulent and void was reversed where the evidence disclosed that, although conveyance was originally made to defendant, the defendant's wife had purchased the realty with her own personal funds. Ryals v. Douglas, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

A husband, though insolvent, has a right to prefer his wife and to protect her interests by conveying his property to her, even though by so doing his other creditors are defeated of their rights and even though the conveyance is made on account of pendency of suits by other creditors against him, the only condition being that there must be existing between husband and wife a valid indebtedness equal to the fair value of the property conveyed. Mississippi Cottonseed Products Co. v. Phelps, 196 Miss. 252, 16 So. 2d 854, 1944 Miss. LEXIS 184 (Miss. 1944).

A conveyance made in good faith and for a valuable, though inadequate, consideration, the value of the property conveyed being substantially in excess of the consideration paid therefor, will be held in equity to be voluntary as to the grantor's creditors to the extent of the value of the property in excess of the consideration paid therefor. Mississippi Cottonseed Products Co. v. Phelps, 196 Miss. 252, 16 So. 2d 854, 1944 Miss. LEXIS 184 (Miss. 1944).

2. Purpose.

The object of the statute is to prevent the necessity of a creditor resorting first to a court of law to recover a judgment, and then going into equity to secure its satisfaction; there is no reason why the court, having jurisdiction under the statute, should stop short of giving the parties all the relief which their case requires. Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305, 1881 Miss. LEXIS 121 (Miss. 1881).

3. Construction with other laws.

An action to set aside a deed on certain property on the basis of fraud under Code § 11-5-75 was not barred by a former action to place a lis pendens notice on the same property pursuant to Code § 11-47-3, where not only were these two causes of action grounded in different statutes but they also involved entirely different classes of litigants, inasmuch as the lis pendens statute was enacted for those who claimed to rightfully own an interest in the property and the statute permitting an attack on fraudulent conveyances was devised for the protection of creditors who had no specific interest in the land. Dunaway v. W.H. Hopper & Associates, Inc., 422 So. 2d 749, 1982 Miss. LEXIS 2314 (Miss. 1982).

This section and those in the chapter on lis pendens relate to different classes of litigants. Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., 85 Miss. 54, 37 So. 502, 1904 Miss. LEXIS 134 (Miss. 1904).

4. Jurisdiction.

The chancery court had jurisdiction of a creditor's bill which sufficiently stated a cause of action under the section [Code 1942, § 1327], and the fact that the nulla bona return was not made within the time prescribed by statute did not divest the court of such jurisdiction. Ferguson v. Johnson Implement Co., 222 So. 2d 820, 1969 Miss. LEXIS 1560 (Miss. 1969).

Jurisdiction of bills by creditors without judgment whose debts are due to set aside fraudulent conveyances and devices to hinder and delay creditors is expressly conferred by § 159 Const. 1890. McBride v. Adams, 70 Miss. 716, 12 So. 699 (Miss. 1893).

5. Enforcement in Federal court.

The remedy imported by a former enactment of this statute (Code of 1880, §§ 1843, 1845), was unavailable in a Federal court by reason of the constitutional guaranty of the right to a jury trial on a claim cognizable at law. Scott v. Neely, 140 U.S. 106, 11 S. Ct. 712, 35 L. Ed. 358 (1891), but see Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693 (1990), superseded by statute on other grounds as stated in Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693, 15 U.S.P.Q.2d (BNA) 1367 (1990); Cates v. Allen, 149 U.S. 451, 13 S. Ct. 883, 37 L. Ed. 804 (1893), superseded by statute on other grounds as stated in Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693 (1990), criticized in In re Bonham, 33 Bankr. Ct. Dec. (CRR) 642 (Bankr. D. Alaska 1998).

6. Right and propriety of action.

Creditors may vacate attachments fraudulently sued out through collusion with the debtor, and subject the attached property, notwithstanding, by statute, they might intervene and contest the attachments at law. McBride v. Adams, 70 Miss. 716, 12 So. 699 (Miss. 1893).

A judgment-creditor may sue in equity to remove obstructions to a fair sale of the debtor's property liable to execution, though he has not exhausted his remedy at law. Jeffries v. Jeffries, 66 Miss. 216, 5 So. 112, 1888 Miss. LEXIS 92 (Miss. 1888).

Notwithstanding the pendency of an action at law for the debt, a bill may be maintained to subject property fraudulently conveyed. Anderson v. Newman, 60 Miss. 532, 1882 Miss. LEXIS 93 (Miss. 1882).

7. Persons entitled to attack challenge, etc.

Simple contract creditors without judgment have no standing in the U. S. District Court on bill to set aside a fraudulent conveyance. Cates v. Allen, 149 U.S. 451, 13 S. Ct. 883, 37 L. Ed. 804 (1893), superseded by statute on other grounds as stated in Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693 (1990), criticized in In re Bonham, 33 Bankr. Ct. Dec. (CRR) 642 (Bankr. D. Alaska 1998).

A tort claimant may maintain an action to set aside a conveyance as in fraud of his rights as a creditor without first obtaining a judgment for damages. Allred v. Nesmith, 245 Miss. 376, 149 So. 2d 29, 1963 Miss. LEXIS 525 (Miss. 1963).

Both antecedent and subsequent creditors of wife may attack her verbal transfer of store and stock of goods to her husband. McCabe v. Guido, 116 Miss. 858, 77 So. 801, 1917 Miss. LEXIS 363 (Miss. 1917).

A trustee in bankruptcy as the representative of the creditors may maintain a suit in equity to set aside fraudulent deeds made by the bankrupt and subject the property conveyed to his debts. Thompson v. First Nat'l Bank, 84 Miss. 54, 36 So. 65, 1904 Miss. LEXIS 4 (Miss. 1904).

Property in the possession of voluntary grantees of a surety on a guardian's bond may be subjected by the wards of the guardian. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

Prior to act of January 26, 1898, only a creditor whose debt was due could invoke the remedy. Browne v. Hernsheim, 71 Miss. 574, 14 So. 36, 1893 Miss. LEXIS 120 (Miss. 1893).

8. Transactions subject to challenge.

Where a contractor misstated facts in a financial statement to a bonding company and where he was notified that claims had been filed with the bonding company, the contractor conveyed his one-half interest in the homestead and stock to wife without consideration, the conveyance was fraudulent and should be set aside at the request of the creditors of the contractor. Fidelity & Deposit Co. v. Lovell, 108 F. Supp. 360, 1952 U.S. Dist. LEXIS 2271 (S.D. Miss. 1952), aff'd, 214 F.2d 565, 1954 U.S. App. LEXIS 4399 (5th Cir. Miss. 1954).

A creditor's bill attacking a fraudulent conveyance should not be dismissed because the land is so defectively described in the alleged fraudulent deed as to render it void upon its face, inasmuch as between the grantee and the grantor it was valid in so far as it conferred upon the grantor the right in equity to have it reformed. This equity the creditor is entitled to have cancelled. Levy v. Royston, 84 Miss. 15, 36 So. 69, 1904 Miss. LEXIS 6 (Miss. 1904).

Where in such a suit, after the court had announced its opinion that the deed was void from defective description, but before final decree was entered, the debtor executed a second deed perfecting the description, the cause on complainant's application should be remanded to the rules to enable him to file a supplemental bill assailing the second deed. Levy v. Royston, 84 Miss. 15, 36 So. 69, 1904 Miss. LEXIS 6 (Miss. 1904).

A writ of seizure in favor of the vendor of personal property cannot be enforced against property in the hands of an assignee or receiver appointed in a suit under the statute. Frank v. Robinson, 65 Miss. 162, 3 So. 253, 1887 Miss. LEXIS 28 (Miss. 1887).

9. Pleading.

Averment of insolvency held sufficient. Ogden v. Amite County Bank, 139 Miss. 875, 104 So. 289, 1925 Miss. LEXIS 163 (Miss. 1925).

Bill to set aside sale under deed of trust for fraud is demurrable for failing to state facts constituting fraud. Weir v. Jones, 84 Miss. 602, 36 So. 533, 1904 Miss. LEXIS 63 (Miss. 1904).

A bill filed under the statute need not show that the defendant debtor is insolvent, nor that complainant cannot obtain satisfaction of his demand without resorting to the property in suit. Citizens' Bank v. Buddig, 65 Miss. 284, 4 So. 94, 1887 Miss. LEXIS 55 (Miss. 1887).

A cross-bill may be predicated on this statute. Heirmann & Kahn v. Stricklin, 60 Miss. 234, 1882 Miss. LEXIS 37 (Miss. 1882).

10. Proof.

Proof that consideration for conveyance of husband to wife of plantation was substantially less than value of the property, not including personal property conveyed, established prima facie case for setting aside deed as a fraud upon the rights of husband's creditors, where conveyance made him insolvent. Mississippi Cottonseed Products Co. v. Phelps, 196 Miss. 252, 16 So. 2d 854, 1944 Miss. LEXIS 184 (Miss. 1944).

11. Liens; priority of liens.

Since a taxpayer who had made a fraudulent conveyance to his wife before federal tax liens arose, had no interest in such property, the federal government acquired no lien on the property but only a right to set the fraudulent conveyance aside, and therefore a creditor of the taxpayer which filed a suit to set aside the fraudulent conveyance a year before the federal lien was asserted, was entitled to priority. United States v. Fidelity & Deposit Co., 214 F.2d 565, 1954 U.S. App. LEXIS 4399 (5th Cir. Miss. 1954).

Where the federal government took no action to assert a tax lien until after a bonding company started suit to have the fraudulent conveyance set aside, the bonding company had a prior lien. Fidelity & Deposit Co. v. Lovell, 108 F. Supp. 360, 1952 U.S. Dist. LEXIS 2271 (S.D. Miss. 1952), aff'd, 214 F.2d 565, 1954 U.S. App. LEXIS 4399 (5th Cir. Miss. 1954).

Creditor not given notice of sale required by bulk sales law may by statutory proceeding acquire lien against purchaser with which other creditors do not share. Kline v. Sims, 149 Miss. 154, 114 So. 871, 1927 Miss. LEXIS 104 (Miss. 1927).

Attacking creditor has statutory lien on property, and right to foreclosure thereof in same proceeding in which established. Grenada Bank v. Waring, 135 Miss. 226, 99 So. 681, 1924 Miss. LEXIS 26 (Miss. 1924).

Where a bill is handed to the clerk and marked "filed" by him, but immediately carried away by the solicitor who stated that he did not wish process issued, there has been no such "filing" as will give him priority of lien over another creditor who, before the return of the bill and issuance of process, has filed a like bill and had process issued thereon. Meridian Nat'l Bank v. Hoyt & Bros. Co., 74 Miss. 221, 21 So. 12, 1896 Miss. LEXIS 142 (Miss. 1896).

A creditor attacking fraudulent attachments of his debtor's property does not acquire a lien superior to other attachments, the validity of which is not attacked and which were levied before the filing of his bill. Levy v. Marx, 18 So. 575 (Miss. 1895).

12. Rights of purchasers.

A bank was not a bona fide, innocent purchaser for value without notice under a subsequent deed of trust from a corporation's officers-directors-stockholders, and was not entitled to priority over rights of the payees of the corporation's notes, as to realty which had not been included in a prior deed of trust from the corporation to the bank but which was attempted to be conveyed by the corporation to its officers-directors-stockholders, where the bank, with knowledge of the corporation's indebtedness to the payees for stock purchased back by the corporation from the payees, encouraged the conveyance and execution of the subsequent deed of trust. Cooper v. Mississippi Land Co., 220 So. 2d 302, 1969 Miss. LEXIS 1451 (Miss. 1969).

Purchaser of goods held not entitled to have amount paid certain of seller's creditors apportioned pro rata, with creditor not given notice, and instituting proceedings under the bulk-sales law. Kline v. Sims, 149 Miss. 154, 114 So. 871, 1927 Miss. LEXIS 104 (Miss. 1927).

13. Effect of bankruptcy.

The lien of a judgment in a suit to set aside conveyances as fraudulent is not affected by defendant's adjudication in bankruptcy subsequent to the filing of the suit more than four months before the bankruptcy proceeding, though prior to judgment. Davis v. Polk Financial Service, 242 Miss. 419, 135 So. 2d 175, 1961 Miss. LEXIS 578 (Miss. 1961).

RESEARCH REFERENCES

ALR.

Assumption of mortgage as consideration for conveyance attacked as in fraud of creditors. 6 A.L.R.2d 270.

Necessary party defendant to action to set aside conveyance in fraud of creditors. 24 A.L.R.2d 395.

Right of creditors who attack as fraudulent a conveyance by third person to debtor's spouse. 35 A.L.R.2d 8.

Venue of action to set aside as fraudulent conveyance of real property. 37 A.L.R.2d 568.

Accountability and rentability for rents and profits of grantee of fraudulently conveyed realty. 60 A.L.R.2d 593.

Right of tort claimant, prior to judgment, to attack transfer as fraudulent. 73 A.L.R.2d 749.

Right of creditor to recover damages for conspiracy to defraud him of claim. 11 A.L.R.4th 345.

Am. Jur.

37 Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 89 - 91, 108- 120.

12A Am. Jur. Pl & Pr Forms (Rev), Fraudulent Conveyances, Form 4.1 (Complaint, petition, or declaration – To vacate and cancel fraudulent conveyances-By judgment creditor).

12 Am. Jur. Pl & Pr Forms (Rev), Fraudulent Conveyances, Forms No. 1-101, 181-186.

25 Am. Jur. Proof of Facts 3d 591, Avoidance and Recovery of Fraudulent Transfers.

CJS.

37 C.J.S., Fraudulent Conveyances § 37.

§ 11-5-77. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 1934; 1892, § 591; 1906, § 642; Hemingway's 1917, § 404; 1930, § 450; 1942, § 1370]

Editor's Notes — Former § 11-5-77 authorized the court to compute amounts due or refer matter to clerk or master for computation in cases involving a mere computation of the sum due.

§ 11-5-79. Decree to operate as judgment of circuit court.

The decree of a court of chancery shall have the force, operation, and effect of a judgment at law in the circuit court.

HISTORY: Codes, 1857, ch. 62, art. 95; 1871, § 1263; 1880, § 1953; 1892, § 594; 1906, § 644; Hemingway's 1917, § 406; 1930, § 453; 1942, § 1373.

JUDICIAL DECISIONS

1. In general.

A chancellor may make his decrees dependent upon the performance of certain conditions which may be waived only with the consent and approval of the chancellor who issued the decree, and such a decree is without force until the conditions have been performed. Twilley v. McLain, 233 So. 2d 794, 1970 Miss. LEXIS 1675 (Miss. 1970).

Lien under alimony decree cannot arise, if at all, until default in payment of installments. Harris v. Worsham, 164 Miss. 74, 143 So. 851, 1932 Miss. LEXIS 224 (Miss. 1932).

Where injunction to restrain execution on money decree was dissolved, execution could issue against sureties on injunction bond for amount of decree. Russ v. Stockstill, 155 Miss. 368, 124 So. 359, 1929 Miss. LEXIS 290 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 A.L.R.3d 1170.

§ 11-5-81. Fieri facias or garnishment on decrees for money.

Whenever the court shall render an order, judgment, or decree for the payment of money against any executor, administrator, or guardian, or any other party litigant therein, a compliance with such order, judgment or decree may be enforced by process of fieri facias or garnishment.

HISTORY: Codes, 1880, § 1957; 1892, § 598; 1906, § 648; Hemingway's 1917, § 410; 1930, § 454; 1942, § 1374.

Cross References — Effect of final decree and partition proceedings, see § 11-21-35.
Enforcement of decree by garnishment, see §§ 11-35-1 et seq.
Interest on judgments and decrees, see § 75-17-7.
Effect of surety paying a decree, see § 87-5-9.
Procedure for enforcement of judgments, see Miss. R. Civ. P. 69.

JUDICIAL DECISIONS

1. Remedies.

In a marital dissolution action, an order restricting the wife's right to pursue enforcement of a judgment against the husband was rendered void because the order operated as a violation of the wife's rights as set forth in the statute; the chancellor did not have the authority to restrict the wife's rights to seek satisfaction of the judgment in the manner reflected in the statute. Jenkins v. Jenkins, 60 So. 3d 198, 2011 Miss. App. LEXIS 180 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity §§ 140- 156.

30 Am. Jur. 2d (Rev), Executions §§ 70, 71, 399.

§ 11-5-83. Sheriff to execute decrees; clerk to issue process.

Decrees, where a master or special commissioner is not appointed to execute them, shall be executed by the sheriff; and the clerk shall issue all writs of fieri facias, habere facias possessionem, or other final process, according to the nature of the case, directed to the sheriff, and returnable to the next term of the court or at such other time as in a given case may be prescribed.

HISTORY: Codes, 1857, ch. 62, art. 98; 1871, § 1266; 1880, § 1956; 1892, § 597; 1906, § 647; Hemingway's 1917, § 409; 1930, § 455; 1942, § 1375.

Cross References — Method of issuing executions, see §§ 13-3-111 through 13-3-121.

Method for levying executions, see §§ 13-3-123 et seq.

Duty of sheriff to execute decrees, see § 19-25-35.

Conveyances by masters, commissioners, or sheriffs, see §§ 89-1-27, 89-1-67.

Form of conveyance by sheriff, see § 89-1-65.

Procedure for enforcement of judgments, see Miss. R. Civ. P. 69.

Sheriff's courtroom duties, see Miss. Uniform Chancery Court Rule 1.03.

JUDICIAL DECISIONS

1. In general.

On final decree confirming sale in suit for partition of land, writ of assistance, which is equivalent to writ of habere facias possessionem at law, can issue without process on defendant divested of all interest in land by the final decree. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744, 1948 Miss. LEXIS 381 (Miss. 1948).

The statute embraces, and authorizes the issuance of, a writ of assistance. Griswold v. Simmons, 50 Miss. 123, 1874 Miss. LEXIS 31 (Miss. 1874); Jones v. Hooper, 50 Miss. 510, 1874 Miss. LEXIS 85 (Miss. 1874).

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity § 156.

§ 11-5-85. Decree to operate as a conveyance.

When a decree shall be made for a conveyance, release or acquittance, or other writing, and the party against whom the decree is made shall not comply therewith, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect, and shall be as available, as if the conveyance, release, or acquittance, or other writing had been executed in conformity to the decree; or the court may appoint a commissioner to execute such writing, which shall have the same effect as if executed by the party.

HISTORY: Codes, 1857, ch. 62, art. 96; 1880, § 1954; 1892, § 595; 1906, § 645; Hemingway's 1917, § 407; 1930, § 456; 1942, § 1376.

Cross References — Prerequisites of conveyance of land, see §§ 89-1-3 et seq.

Court's authority to enter judgment by divesting title of any party and vesting it in others, see Miss. R. Civ. P. 70.

JUDICIAL DECISIONS

1. In general.

A commissioner may be appointed as provided hereunder to make a conveyance in accordance with the decree of the court in an action for specific performance providing that if it should be found that the vendors had been fully paid for real estate sold by them they should be directed to execute a warranty deed to the purchaser. Baker v. Hardy, 194 Miss. 662, 11 So. 2d 803, 1943 Miss. LEXIS 36 (Miss. 1943).

In action for confirmation of title to lands purchased on foreclosure of trust deed, where decree directed that title be confirmed in defendants, decree canceled plaintiff's claim to the land. Cartee v. Blacketor, 179 Miss. 665, 176 So. 532, 1937 Miss. LEXIS 63 (Miss. 1937).

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity §§ 140- 156.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

§§ 11-5-87 and 11-5-89. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-5-87. [Codes, 1942, § 1390; Laws, 1934, ch. 252]

§ 11-5-89. [Codes, 1857, ch. 62, art. 36; 1871, § 1070; 1880, § 1859; 1892, § 519; 1906, § 570; Hemingway's 1917, § 330; 1930, § 470; 1942, § 1391; Laws, 1962, ch. 287]

Editor's Notes — Former § 11-5-87 authorized any party to request the court to separately state its findings of fact and conclusions of law.

Former § 11-5-89 specified when decrees on publication only were final.

§ 11-5-91. Reopening of judgment rendered on publication only.

A defendant against whom a judgment has been rendered on publication only may request to reopen the judgment pursuant to the procedures provided for in the Mississippi Rules of Civil Procedure. The title to property sold to a purchaser, in good faith, in pursuance of a judgment, shall not be affected by reopening of the judgment.

HISTORY: Codes, 1857, ch. 62, art. 37; 1871, § 1071; 1880, § 1860; 1892, § 520; 1906, § 571; Hemingway's 1917, § 331; 1930, § 471; 1942, § 1392; Laws, 1991, ch. 573, § 18, eff from and after July 1, 1991.

Cross References — Rule relative to relief from judgment or order, see Miss. R. Civ. P. 60.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Parties entitled to rehearing.
3. Other remedy.

1. In general.

A mere statement that petitioner has an interest or claim is not sufficient to reopen a case under this section. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

Reopening of proceedings to confirm title should be done only where the right clearly appears in the petition. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

The purpose of the legislature in requiring a petition to reopen is to confine reopening to the discretion of the chancellor, who, in the exercise thereof, must have sufficient facts to guide him. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

After the petition for rehearing is allowed, the suit is a pending one, and the complainant may dismiss it. Belcher v. Wilkerson, 54 Miss. 677, 1877 Miss. LEXIS 78 (Miss. 1877).

2. Parties entitled to rehearing.

A nonresident, who was not a named defendant in proceedings to confirm a tax title, must in his petition to set aside such proceedings show the court, by averments, the facts with reference to his status as one having or claiming an interest in the land. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

In an action to reopen proceedings confirming tax title after final decree therein, a nonresident who was not a named defendant in such proceedings cannot maintain the action by a mere allegation that he claimed the undivided one-fourth equitable interest in the land. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

A decree pro confesso taken against nonresident defendants who failed to answer by publication as summoned lost its finality, and the cause in which it was rendered again became a pending cause when the defendants within two years after rendition of the decree applied to the court by which it was rendered for a rehearing. Henderson v. Odom, 198 Miss. 208, 22 So. 2d 159, 1945 Miss. LEXIS 186 (Miss. 1945).

3. Other remedy.

Although nonresident defendants, against whom a decree pro confesso was taken upon their failure to answer by publication and summons, have right to apply to the court rendering the decree for a rehearing, they also have the right to treat the decree as final and to appeal therefrom in order to avoid danger under this section [Code 1942, § 1392] that the property might be sold to a purchaser in good faith pursuant to the decree. Henderson v. Odom, 198 Miss. 208, 22 So. 2d 159, 1945 Miss. LEXIS 186 (Miss. 1945).

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity § 157.

§ 11-5-93. Sales of realty under decrees.

Every sale of real estate ordered by a decree of any court of chancery shall be made for cash, unless otherwise ordered by the court, and at such place and on such notice as may be directed in the decree; and if direction be not given, at such place and on such notice as is required in case of sales of land under execution at law. The person making the sale, if made on credit, shall take bond, with sufficient security, in double the amount of the purchase money, payable to the parties entitled to receive the same under the decree, or to such persons as the court may direct, conditioned for the payment of the purchase money, with interest at the rate borne by the decree, to the time when the same, as directed by the decree, shall fall due. Such bond shall be returned and filed in the clerk's office, and if not paid at maturity, shall have the force and effect of a judgment; and the clerk shall issue execution thereon. If any of the obligees be dead, the execution shall be in favor of the survivors and the representatives of those deceased. And in all decrees for the sale of real estate, the chancellor may fix a sum to be paid on sale, and if the sale be not confirmed, the sum so paid shall be returned to the bidder. If the purchaser fail to pay the amount of his bid or to comply with the decree, the amount advanced shall go to the party entitled to the purchase money, and the land shall be resold.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 2 (33); 1857, ch. 62, art. 59; 1871, § 1038; 1880, § 1959; 1892, § 599; 1906, § 649; Hemingway's 1917, § 411; 1930, § 457; 1942, § 1377.

Cross References — Constitutional direction for sale of lands under decree of court, see Miss. Const. Art. 4, § 111.

Sale of lands in partition proceeding, see § 11-21-11.

Stay of execution by bond, see § 11-51-59.

Procedure for making sales under execution, see §§ 13-3-161 et seq.

Limitation of actions for property sold by order of court, see § 15-1-37.

Conveyances for lands sold under decree of court, see § 89-1-27.

Procedure for selling lands under mortgages and deeds of trust, see § 89-1-55.

Provision for suspension of inconsistent laws regarding foreclosure of mortgaged property in certain emergency situations, see § 89-1-319.

Sale of goods seized under distress, see § 89-7-69.

Sale of decedent's property by executors and administrators, see §§ 91-7-175 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Notice.
3. Consideration.

1. In general.

A partition sale of real estate conformed to the requirements of §§ 11-5-93 and 11-5-95, and did not violate either the order or legal notice, which asserted that the sale would be at the south front door of the courthouse, regardless of whether the sale was conducted inside or outside the front door. McCormick v. McCormick, 449 So. 2d 1209, 1984 Miss. LEXIS 1711 (Miss. 1984).

Decree ordering correction of description of land in deed of trust being foreclosed held not erroneous as eliminating from deed of trust description of other property. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

A purchaser cannot be put in possession until the sale has been reported and confirmed. Adler v. Meyer, 73 Miss. 863, 19 So. 893, 1896 Miss. LEXIS 209 (Miss. 1896).

The presumption of validity which the law attaches to ancient deeds will aid an administrator's or executor's sale. Stevenson's Heirs v. McReary, 20 Miss. 9, 1849 Miss. LEXIS 1 (Miss. 1849).

2. Notice.

In a partition action, the chancellor's award of attorney's fees payable by the appealing parties, and assessed against the sale proceeds, was error, as there was no evidence that said fees were reasonable and there was no bad faith shown. Further, as to notice of the sale, Miss. Code Ann. § 13-3-163 did not apply where the chancellor gave specific instruction for terms of the sale pursuant to Miss. Code Ann. §§ 11-5-93 and 11-5-95, and while the sale price was low, the chancellor did not abuse his discretion in refusing to set aside the sale. Necaise v. Ladner, 910 So. 2d 699, 2005 Miss. App. LEXIS 194 (Miss. Ct. App. 2005).

In an action by a homeowners' association to enforce a lien on defendant's property after defendant had failed to pay an annual assessment to the association for maintenance of common areas, the chancery court properly ruled that the assessment was a covenant running with the land and that defendant was liable, despite defendant's contentions that the action was barred by the statute of frauds (§ 15-3-1). Furthermore, the chancery court's decree was enforceable under this section, even though it failed to fix the time and terms of the sale of defendant's property. William W. Bond, Jr. & Associates, Inc. v. Lake O'The Hills Maintenance Asso., 381 So. 2d 1043, 1980 Miss. LEXIS 1919 (Miss. 1980).

This section governs in the matter of sales and notice thereof under the decrees. Worthy v. Graham, 246 Miss. 358, 149 So. 2d 469, 1963 Miss. LEXIS 449 (Miss. 1963).

Failure of commissioner appointed to carry out chancellor's decree granting foreclosure of mortgage to name one of mortgagors in notice of sale held not to invalidate sale, since all interested parties were in court and were expected to follow proceedings and ascertain sale day fixed in order. Jones v. Spearman, 174 Miss. 781, 165 So. 294, 1936 Miss. LEXIS 196 (Miss. 1936).

Sale of land must accord with order as to place and notice. Howard v. Jayne, 124 Miss. 65, 86 So. 752, 1920 Miss. LEXIS 497 (Miss. 1920).

Failure to give the prescribed notice will not render the sale void. Bland v. Muncaster, 24 Miss. 62, 1852 Miss. LEXIS 8 (Miss. 1852); Hanks v. Neal, 44 Miss. 212, 1870 Miss. LEXIS 102 (Miss. 1870).

3. Consideration.

Evidence held to show that upset price for mortgaged premises fixed by court in foreclosure suit was reasonable, and that higher price could not be had on resale. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

That property sold under foreclosure suit might sell for much more at later time will not afford ground in equity for setting aside sale. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

On collateral attack grossly inadequate consideration will not be held to invalidate a judicial sale of land made in unsettled and troubled times, and land was encumbered with life estate postponing purchaser's occupancy 35 years. Ladd v. Craig, 94 Miss. 659, 47 So. 777, 1909 Miss. LEXIS 326 (Miss. 1909).

RESEARCH REFERENCES

ALR.

Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale. 2 A.L.R.2d 6.

Propriety of setting minimum or "upset price" for sale of property at judicial foreclosure. 4 A.L.R.5th 693.

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales §§ 8- 13.

CJS.

50A C.J.S., Judicial Sales §§ 30-41.

§ 11-5-95. Court may fix terms of sale.

All property may be sold on such terms and at such time and place as the court may direct.

HISTORY: Codes, 1880, § 2044; 1892, § 601; 1906, § 651; Hemingway's 1917, § 413; 1930, § 458; 1942, § 1378.

JUDICIAL DECISIONS

1. In general.

In a partition action, the chancellor's award of attorney's fees payable by the appealing parties, and assessed against the sale proceeds, was error, as there was no evidence that said fees were reasonable and there was no bad faith shown. Further, as to notice of the sale, Miss. Code Ann. § 13-3-163 did not apply where the chancellor gave specific instruction for terms of the sale pursuant to Miss. Code Ann. §§ 11-5-93 and 11-5-95, and while the sale price was low, the chancellor did not abuse his discretion in refusing to set aside the sale. Necaise v. Ladner, 910 So. 2d 699, 2005 Miss. App. LEXIS 194 (Miss. Ct. App. 2005).

A partition sale of real estate conformed to the requirements of §§ 11-5-93 and 11-5-95, and did not violate either the order or legal notice, which asserted that the sale would be at the south front door of the courthouse, regardless of whether the sale was conducted inside or outside the front door. McCormick v. McCormick, 449 So. 2d 1209, 1984 Miss. LEXIS 1711 (Miss. 1984).

Failure of commissioner appointed to carry out chancellor's decree granting foreclosure of mortgage to name one of mortgagors in notice of sale held not to invalidate sale, since all interested parties were in court and were expected to follow proceedings and ascertain sale day fixed in order. Jones v. Spearman, 174 Miss. 781, 165 So. 294, 1936 Miss. LEXIS 196 (Miss. 1936).

That property sold under foreclosure suit might sell for much more at later time will not afford ground for setting aside sale. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

Evidence held to show that price fixed by court in foreclosure suit was reasonable, and that higher price could not be had on resale. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

Decree ordering correction of description of land in deed of trust being foreclosed held not erroneous as eliminating from deed of trust other property. Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639, 1934 Miss. LEXIS 14 (Miss. 1934).

This section, as applicable to sale of property by a receiver, does not require notice of sale to be given to creditors. United States Fidelity & Guaranty Co. v. McCain, 136 Miss. 30, 136 Miss. 306, 101 So. 197, 1924 Miss. LEXIS 113 (Miss. 1924).

Where decree authorizes administrator to name the place of sale, confirmation makes a judicial sale that of the court, and the purchaser thereunder is entitled to the full benefit of his contract which will be enforced for and against him. Ladd v. Craig, 94 Miss. 659, 47 So. 777, 1909 Miss. LEXIS 326 (Miss. 1909).

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales §§ 15, 24.

CJS.

50A C.J.S., Judicial Sales §§ 25-27.

§ 11-5-97. Lien on land sold on credit.

All land sold under decree of the chancery court shall be held liable and subject to a lien for the unpaid purchase money therefor as if a mortgage had been executed by the purchaser and duly recorded; and said lien shall exist until actual payment of the purchase money, or until, by order of the court or chancellor, the same shall be discharged.

HISTORY: Codes, 1871, § 1150; 1880, § 2048; 1892, § 602; 1906, § 652; Hemingway's 1917, § 414; 1930, § 459; 1942, § 1379.

Cross References — Priority of mortgage for purchase money of land, see § 89-1-45.

JUDICIAL DECISIONS

1. In general.

An administrator or executor who charges himself with the receipt of the money although sale was on credit, and final settlement is confirmed by probate court, the land is discharged of the lien, and he is estopped to deny the payment; and the heirs are estopped if they do not object thereto on final settlement. Lambeth v. Elder, 44 Miss. 80, 1870 Miss. LEXIS 86 (Miss. 1870).

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales §§ 29- 31, 49, 58, 63–65.

CJS.

50A C.J.S., Judicial Sales §§ 93, 109-124, 130-136.

§ 11-5-99. Hour and adjournment of sales.

A sale of real estate shall not commence before the hour of eleven o'clock on the day appointed, nor continue longer than four o'clock of the same day; but if the time be insufficient to complete the sale, it may be continued from day to day until completed, by giving public notice to the company present at the conclusion of each day's sale; and such sale on the succeeding day shall commence and end as directed for the first day.

HISTORY: Codes, 1871, § 1152; 1880, § 2049; 1892, § 604; 1906, § 654; Hemingway's 1917, § 416; 1930, § 460; 1942, § 1380.

Cross References — Time and method of making sales under execution, see § 13-3-169.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales § 9.

CJS.

50A C.J.S., Judicial Sales §§ 51, 55.

§ 11-5-101. Person making sale not to purchase.

In no instance shall the person who makes the sale become, either directly or indirectly, the purchaser at a sale made by him.

HISTORY: Codes, 1892, § 603; 1906, § 653; Hemingway's 1917, § 415; 1930, § 461; 1942, § 1381.

JUDICIAL DECISIONS

1. Purchase by mortgagee's affiliate.
Because a second mortgagee lawfully foreclosed the mortgagor's property under Miss. Code Ann. § 89-1-55 and paid off a primary loan and there was no legal prohibition under Miss. Code Ann. §§ 11-5-101 and 89-1-63 for the mortgagee's affiliate to purchase the property at foreclosure, any rights of the mortgagor in the property were extinguished by the foreclosure sale. Pepper v. Homesales, Inc., 2009 U.S. Dist. LEXIS 16692 (S.D. Miss. Mar. 3, 2009).

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur. 2d (Rev), Judicial Sales § 18.

CJS.
50A C.J.S., Judicial Sales §§ 28, 29.

§ 11-5-103. Report of sale of land.

And when the sale has been completed, the person making the same shall make report thereof in writing to the court, stating the time and place of sale, the name of the purchaser, and the amount of purchase money, and shall satisfy the court that the directions prescribed in the decree of sale and the law have been followed; and thereupon the court shall proceed to make a decree confirming the sale, unless good reason be shown to the contrary. And the court shall order the person who made the sale to make a conveyance to the purchaser of the land so sold; but if the sale be not reported to the following term, the court may compel the making of a proper report at a subsequent term, and may then confirm or set aside the same; and the person failing to make such report in proper time may be fined, as for a contempt, not exceeding one hundred dollars.

HISTORY: Codes, 1871, § 1151; 1880, § 2050; 1892, § 605; 1906, § 655; Hemingway's 1917, § 417; 1930, § 462; 1942, § 1382.

Cross References — For rules governing the reports of masters and court-ordered conveyances of realty, see Miss. R. Civ. P. 53, 70.

JUDICIAL DECISIONS

1. In general.
Where price at judicial sale is grossly inadequate chancellor may order resale. George v. Woods, 94 Miss. 268, 49 So. 147 (Miss. 1908).

Court properly directed resale on tenant failing to pay amount as against objection of purchaser at the sale. George v. Woods, 94 Miss. 268, 49 So. 147 (Miss. 1908).

A purchaser cannot be put in possession until the sale has been reported and confirmed. Adler v. Meyer, 73 Miss. 863, 19 So. 893, 1896 Miss. LEXIS 209 (Miss. 1896).

Confirmation of a sale, reported at a term subsequent to that which next followed the sale, without notice, is not void. Johnson v. Cooper, 56 Miss. 608, 1879 Miss. LEXIS 174 (Miss. 1879).

It is not an objection to an administrator's sale that he was ordered by the decree to sell and report to a certain term of court, and that he did not sell until after that time. Yerger v. Ferguson, 55 Miss. 190, 1877 Miss. LEXIS 122 (Miss. 1877).

If the decree confirming the sale recite that notice of the sale was given, this is sufficient on appeal, though the notice do not appear of record. Yerger v. Ferguson, 55 Miss. 190, 1877 Miss. LEXIS 122 (Miss. 1877).

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales § 45.

15 Am. Jur. Pl & Pr Forms (Rev), Judicial Sales, Forms 61-70.

CJS.

50A C.J.S., Judicial Sales §§ 64-68.

§ 11-5-105. On death of executor, or other person authorized, who shall sell or convey.

If the executor, administrator, guardian, master, or special commissioner who was ordered to make a sale or lease, shall die, resign, or be removed before doing it, such sale or lease may be made by the successor of such executor, administrator, guardian, master, or commissioner, or by any person appointed by the court or the chancellor in vacation to make it. In case of a death, resignation or removal of an executor, administrator, guardian, master, or commissioner, after making a sale, and before its report or confirmation, or before a conveyance of the title, in case of the sale of land, the court shall ascertain the facts, and, if satisfied that the sale ought to be confirmed, shall make a decree confirming it, and order a conveyance, if land was sold, to be made to the purchaser, either by the successor in the administration or guardianship of the person who made the sale, or by a master or commissioner appointed for that purpose; and such conveyance shall have the same effect to vest the title in the person to whom it is made, as if it had been made and delivered by the person who made the sale.

HISTORY: Codes, 1880, § 2051; 1892, § 606; 1906, § 656; Hemingway's 1917, § 418; 1930, § 463; 1942, § 1383.

Cross References — Sale of land by executors and administrators, see §§ 91-7-187 et seq.

Rules governing the reports of masters and court-ordered conveyances of realty, see Miss. R. Civ. P. 53, 70.

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur. 2d (Rev), Judicial Sales §§ 41, 42.

CJS.
50A C.J.S., Judicial Sales §§ 109-113.

§ 11-5-107. Sales, leases, partitions, may be reported and confirmed in vacation; proceedings.

Reports of sales of lands or leases or of partition in kind, where there is no contest, may be made in vacation to the chancellor, and upon five days' notice to the parties and the purchaser or lessee, or to the parties to the proceedings for partition in kind, of the time and place of hearing the application therefor, or upon such publication for any of the interested parties who may be nonresidents of this state, or who cannot be found upon diligent inquiry, as is required for nonresident or absent defendants in chancery, may be confirmed by him. But the said five days' notice to parties and the purchaser, or lessee or to the parties defendant to the proceedings for partition in kind of the time and place of hearing application therefor, and also such publication for any of the interested parties who may be nonresidents of this state, and to persons who cannot be found upon diligent inquiry, may be dispensed with, provided the interlocutory decree ordering said sale or lease or partition in kind shall specifically designate a definite date and place for the hearing of such application to confirm said report of sale, or lease, or partition in kind before the chancellor in vacation, but said application to confirm shall not be heard earlier than five days after the report of such sale or lease, or partition in kind shall have been filed in the proper court with papers in the cause.

HISTORY: Codes, 1892, § 607; 1906, § 657; Hemingway's 1917, § 419; 1930, § 464; 1942, § 1384; Laws, 1900, ch. 95; Laws, 1922, ch. 228.

Cross References — Decree of confirmation in partition proceedings, see §§ 11-21-35 et seq.

JUDICIAL DECISIONS

1. In general.

Under this statute authorizing private sales, where there is a private sale or lease upon terms disclosed to, or required by, the court, and thereby approved, the transaction is confirmed by the decree directing it. Such decree is not a mere "interlocutory decree ordering said sale or lease," as expressed in this section, but a decree executed after petition and hearing, at which all the terms disclosed by tender of the conveyances are heard and considered and thereby confirmed. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Confirmation is not necessary of a private sale of mineral lease and royalty interests in realty belonging to minor wards, where such sale was made pursuant to court decree authorizing the same on terms disclosed in guardian's petition, even assuming that such sale was a "sale of land" contemplated by Code 1942, § 1389, and notwithstanding that decree authorizing conveyance of royalty interest provided that the guardian should make due report to the chancellor for confirmation. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Chancellor without power to confirm in vacation a judicial sale where protest is filed on the ground of gross inadequacy of price. George v. Woods, 94 Miss. 268, 49 So. 147 (Miss. 1908).

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur. 2d (Rev), Judicial Sales §§ 46, 47, 68, 69- 71.
15 Am. Jur. Pl & Pr Forms (Rev), Judicial Sales, Forms 83-91.

CJS.
50A C.J.S., Judicial Sales §§ 69-71.

§ 11-5-109. Bond to prevent confirmation.

The party who objects to a sale under a decree because of the inadequacy of the bid, or any person interested therein, may prevent the confirmation thereof by entering into a bond in a penalty equal to double the amount of the bid, with sufficient sureties, to be approved by the court or clerk, payable to the opposite party, conditioned to pay all costs of a resale, and that the property shall bring thereat an advance of not less than twenty per centum upon the bid, exclusive of the cost of resale.

HISTORY: Codes, 1892, § 600; 1906, § 650; Hemingway's 1917, § 412; 1930, § 465; 1942, § 1385; Laws, 1884, p. 71.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Effect of failure to require bond.

1. In general.

Defects in bond to prevent confirmation of sale were cured by Code 1906 § 1022. Little v. Cammack, 109 Miss. 753, 69 So. 594, 1915 Miss. LEXIS 222 (Miss. 1915).

One who procures a resale under the statute must be treated as starting the bidding on the resale at twenty per centum advance on the former sale. Mason v. Martin, 64 Miss. 572, 1 So. 756, 1886 Miss. LEXIS 111 (Miss. 1886).

The statute relates to the remedy. John Chaffe & Sons v. Aaron, 62 Miss. 29, 1884 Miss. LEXIS 10 (Miss. 1884).

2. Effect of failure to require bond.

Where three of four heirs conducted a sale of property which was to be auctioned to the hightest bidder for cash, and the fourth heir was the highest bidder, the State Supreme Court held that Miss. Code Ann. § 11-5-109 did not apply and the fourth heir was not required to post a bond. Hataway v. Estate of Nicholls, 893 So. 2d 1054, 2005 Miss. LEXIS 109 (Miss. 2005).

Where the wife objected to the sale of the marital home to the husband's brother and the home was subsequently foreclosed on and sold for less than the brother's bid, the appellate court did not address the issue of whether the chancellor erred when he did not require a bond because there were no funds from which to address the shortfall from the original bid to the amount received for the property later. Curtis v. Curtis, 796 So. 2d 1044, 2001 Miss. App. LEXIS 396 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR.

Validity and effect under Federal Arbitration Act (9 U.S.C.S. §§ 1 et seq.) of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement. 159 A.L.R. Fed. 1.

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales §§ 67, 83.

15 Am. Jur. Pl & Pr Forms (Rev), Judicial Sales, Form 102.

CJS.

50A C.J.S., Judicial Sales § 118.

§ 11-5-111. Decree for balance after sale of property.

Upon the confirmation of the report of sale of any property, real or personal, under a decree for sale to satisfy a mortgage, deed of trust, or other lien on such property, if there be a balance due to the complainant, the court, upon motion, shall give a decree against the defendant for any such balance for which by the record of the case he may be personally liable, upon which decree execution may issue.

HISTORY: Codes, 1880, § 1935; 1892, § 592; 1906, § 643; Hemingway's 1917, § 405; 1930, § 466; 1942, § 1386.

Cross References — Procedure for selling lands under mortgages and deeds of trust, see §§ 89-1-55 et seq.

JUDICIAL DECISIONS

1. In general.

Mortgagee is entitled to deficiency judgment from debtor for balance due on indebtedness after proceeds of foreclosure sale are applied to debt unless mortgagee's actions have been inequitable. OMP v. Security Pacific Business Finance, Inc., 716 F. Supp. 251, 1989 U.S. Dist. LEXIS 7344 (N.D. Miss. 1989).

Mortgagee seeking deficiency judgment has burden of proving entitlement under principles of equity; it must first be determined if mortgagee has endeavored to collect indebtedness out of land; then, it must be determined whether value of property satisfies debt of mortgagor or creates surplus. Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461, 1985 Miss. LEXIS 2177 (Miss. 1985).

A written motion is entirely unnecessary under this section, and the absence thereof deprives a judgment debtor of no substantial right, as against the contention that this section is mandatory in its requirement that a motion in writing is jurisdictional in order to entitle a judgment creditor to a deficiency judgment upon the stated confirmation of the report of sale of any property under a deed of trust. Roebke v. Love, 186 Miss. 609, 191 So. 122, 1939 Miss. LEXIS 238 (Miss. 1939).

Complainant in trust deed foreclosure proceeding has option to take complete personal monetary decree in foreclosure decree or to take therein only decree adjudging amount due, declaring lien, and ordering sale, and obtain personal decree for balance due after sale. Edgewater Park Co. v. Standard Bond, etc., Co., 162 Miss. 684, 138 So. 811, 1932 Miss. LEXIS 114 (Miss. 1932).

On confirmation of sale on foreclosure court may render judgment for balance of claim; if motion for judgment for balance in lienholder's suit made on day of confirmation, no notice required; limitation on deficiency judgment entered on confirmation of foreclosure sale runs from its entry. Continental Gin Co. v. Mathers, 132 Miss. 821, 96 So. 744, 1923 Miss. LEXIS 80 (Miss. 1923); Weir v. Field, 67 Miss. 292, 7

So. 355, 1889 Miss. LEXIS 92 (Miss. 1889).

In a suit to foreclose a mortgage on the land of a wife to secure the joint note of herself and husband, the note and mortgage being void as to her because of her insanity, a personal decree should be rendered against the husband. Atkinson v. Felder, 78 Miss. 83, 29 So. 767, 1900 Miss. LEXIS 175 (Miss. 1900).

The right to move for a personal decree is not confined to the term at which the sale is confirmed, but may be exercised at any time before the decree becomes barred. Notice is unnecessary if the motion be made at the time of confirmation, but if made at a subsequent term it is necessary. Such decree may be obtained against the personal representative of a deceased debtor. Weir v. Field, 67 Miss. 292, 7 So. 355, 1889 Miss. LEXIS 92 (Miss. 1889).

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity §§ 140- 156.

Law Reviews.

1979 Mississippi Supreme Court Review: Property. 50 Miss. L. J. 865, December 1979.

§ 11-5-113. Provisions applicable to all sales made by order or decree of the court.

All the provisions of this chapter on the subject of sales shall apply to all sales of real estate under any decree in the chancery court made in matters testamentary and of administration, minors' business, cases of persons with an intellectual disability, persons with mental illness and persons of unsound mind, of partition, and all other matters.

HISTORY: Codes, 1857, ch. 62, art. 59; 1871, § 1038; 1880, § 1959; 1892, § 608; 1906, § 658; Hemingway's 1917, § 420; 1930, § 467; 1942, § 1387; Laws, 2008, ch. 442, § 5; Laws, 2010, ch. 476, § 5, eff from and after passage (approved Apr. 1, 2010.).

Cross References — Sales of real estate and partition proceedings, see §§ 11-21-27 et seq.

Sales of real estate in matters testamentary and of administration, see §§ 91-7-187 et seq.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales § 1.

CJS.

50A C.J.S., Judicial Sales §§ 1-6.

§ 11-5-115. Rights of infants saved.

When a decree shall be made for the sale or conveyance of the real estate of an infant, such decree shall be binding on the infant unless he shall, within one year after attaining the age of twenty-one years, show to the court good cause to the contrary; and it shall not be necessary to insert the saving in the decree, but the saving shall not extend to decrees for the sale of the property of deceased persons, authorizing sales by guardians, or enforcing deeds of trust or mortgages.

HISTORY: Codes, 1857, ch. 62, art. 97; 1871, § 1265; 1880, § 1955; 1892, § 596; 1906, § 646; Hemingway's 1917, § 408; 1930, § 468; 1942, § 1388.

Cross References — Definition of the term "infant," see § 1-3-21.
Limitations of personal actions of infants, see § 15-1-59.
Validity of contracts made during infancy, see § 15-3-11.
Infant's title to property acquired by descent, see § 91-1-31.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Character of sale as void or voidable.
3. Interest acquired under sale.
4. Impeachment of decree of sale.
5. —Time for impeachment.
6. —Right to rehearing or review.
7. Laches.

1. In general.

This section was not intended as a sword to prevent an infant from attacking a fraud perpetrated upon him. Box v. House, 212 Miss. 154, 54 So. 2d 218, 1951 Miss. LEXIS 437 (Miss. 1951).

This section is not applicable in a suit to cancel deeds on the ground that they were procured by fraud. Box v. House, 212 Miss. 154, 54 So. 2d 218, 1951 Miss. LEXIS 437 (Miss. 1951).

This section is substitute for ancient rule to insert such saving in decree, and has effect as though such right was actually reserved in decree. Dendy v. Commercial Bank & Trust Co., 143 Miss. 56, 108 So. 274, 1926 Miss. LEXIS 243 (Miss. 1926).

Duty of next friend to protect rights of ward throughout partition suit and to prevent confirmation of sale if prejudicial to ward's rights. Memphis Stone & Gravel Co. v. Archer, 120 Miss. 453, 82 So. 315, 1919 Miss. LEXIS 107 (Miss. 1919).

The court must make valuable elections for minor defendants, redeem their property from liens or tax sales, and see generally that their interests are fully protected. Northern v. Scruggs, 118 Miss. 353, 79 So. 227, 1918 Miss. LEXIS 87 (Miss. 1918).

2. Character of sale as void or voidable.

Purchase by grandfather and next friend of minor was not void where the reasonable value of the land was paid, but was voidable at the minor's election within the time allowed infant to exercise such right. Memphis Stone & Gravel Co. v. Archer, 120 Miss. 453, 82 So. 315, 1919 Miss. LEXIS 107 (Miss. 1919).

3. Interest acquired under sale.

An absolute title cannot be acquired under a decree against an infant until the expiration of the year after his majority. The purchaser of the property should be made a party to the proceeding to vacate the decree. McLemore v. Chicago, S. L. & N. O. R. Co., 58 Miss. 514, 1880 Miss. LEXIS 151 (Miss. 1880).

4. Impeachment of decree of sale.

Minors within statutory period after arriving at majority held entitled to have partition sale at which their property was bought in under agreement set aside and property repartitioned. Dendy v. Commercial Bank & Trust Co., 143 Miss. 56, 108 So. 274, 1926 Miss. LEXIS 243 (Miss. 1926).

A decree rendered in an infant's favor on a bill filed in his name by a next friend cannot, in the absence of fraud, be reopened by the infant. Johns v. Harper, 61 Miss. 142, 1883 Miss. LEXIS 87 (Miss. 1883).

An infant may by an original bill impeach a decree against him. Sledge v. Boone, 57 Miss. 222, 1879 Miss. LEXIS 49 (Miss. 1879); Enochs v. Harrelson, 57 Miss. 465, 1879 Miss. LEXIS 99 (Miss. 1879).

5. —Time for impeachment.

This section does not limit time infant may attack partition sale for bad faith of their next friend. Smith v. Strickland, 139 Miss. 1, 103 So. 782, 1925 Miss. LEXIS 117 (Miss. 1925).

If the infant wish to interpose a new defense, he must, in general, wait until he has become adult; but for special circumstances shown may obtain leave to make new defense during infancy; if the desire be to impeach the decree for fraud, collusion, or error, he may proceed by original bill during minority. McLemore v. Chicago, S. L. & N. O. R. Co., 58 Miss. 514, 1880 Miss. LEXIS 151 (Miss. 1880).

A party, within the year after his arriving at majority, may attack a decree rendered against him during infancy by averring matter aliunde the record. After the expiration of the year he stands on the same ground as if he had been adult when the decree was entered. Mayo v. Clancy, 57 Miss. 674, 1880 Miss. LEXIS 32 (Miss. 1880).

Where an improper decree has been made against an infant, it may be impeached by an original bill, and the infant need not wait until attaining full age, but may apply to open the decree as soon as he sees fit. Sledge v. Boone, 57 Miss. 222, 1879 Miss. LEXIS 49 (Miss. 1879).

6. —Right to rehearing or review.

This section grants the special privilege of a rehearing and that when a quondam infant comes within the one year period, the original case will then stand so far as he is concerned as though no decree had ever been made, and it becomes the duty of the court to hear the cause as though it had not been heard before. Box v. House, 212 Miss. 154, 54 So. 2d 218, 1951 Miss. LEXIS 437 (Miss. 1951).

Right to review adverse decree is available to minor affected whether he be complainant or defendant. Dendy v. Commercial Bank & Trust Co., 143 Miss. 56, 108 So. 274, 1926 Miss. LEXIS 243 (Miss. 1926).

An infant party decreed to hold land in trust is entitled of right to a rehearing if willing to assume all the consequences of his own suit. Hebron v. Kelly, 77 Miss. 48, 23 So. 641, 1899 Miss. LEXIS 33 (Miss. 1899).

The affirmance of the decree by the Supreme Court will not bar the application for a rehearing, and this is true though the infant prosecuted the appeal. Vaughn v. Hudson, 59 Miss. 421, 1882 Miss. LEXIS 129 (Miss. 1882).

7. Laches.

Apparent laches of minors should not operate to their prejudice. Northern v. Scruggs, 118 Miss. 353, 79 So. 227, 1918 Miss. LEXIS 87 (Miss. 1918).

RESEARCH REFERENCES

CJS.

30A C.J.S., Equity §§ 48, 51, 52.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

§ 11-5-117. Private sales authorized.

(1) In addition to the law now in force authorizing the chancery court to decree the sale of land and personal property, the chancery court and the chancellor in vacation are authorized in all matters providing for a sale or lease of real and personal property, including matters testamentary and of administration, minors' business, persons with mental illness, partition and receivers, to order or decree the sale or lease of real and personal property or any interest in the property, including timber, oil, gas and minerals, at private sale, under such terms and conditions as the chancellor may impose. If all of the terms of sale are made certain by the order or decree, a deed or lease executed

in full compliance with the order or decree shall become immediately effective without further confirmation by the court or chancellor.

(2) This section shall not be construed to invalidate any proceedings previously done in conformity with this section.

HISTORY: Codes, 1930, § 469; 1942, § 1389; Laws, 1930, ch. 42; Laws, 1936, ch. 327; Laws, 1956, ch. 224, §§ 1-3; Laws, 2008, ch. 442, § 6, eff from and after July 1, 2008.

Cross References — Private sale of personal property by executors and administrators, see § 91-7-177.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Setting sale aside.

1. In general.

The power conferred by this section does not encompass a lease with option to purchase at a price to be determined by privately appointed appraisers, on which rent payments are to be credited. Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 162 So. 2d 874, 1964 Miss. LEXIS 408 (Miss. 1964).

Under this section, where there is a private sale or lease upon terms disclosed to, or required by, the court, and thereby approved, the transaction is confirmed by the decree directing it. Such decree is not a mere "interlocutory decree ordering said sale or lease," as expressed in statute (Code 1942, § 1384), providing for confirmation thereof in vacation, but a decree executed after petition and hearing, at which all the terms disclosed by tender of the conveyances are heard and considered and thereby confirmed. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Confirmation is not necessary of a private sale of mineral lease and royalty interests in realty belonging to minor wards, where such sale was made pursuant to court decree authorizing the same on terms disclosed in guardian's petition, even assuming that such sale was a "sale of land" contemplated by this section, and notwithstanding that decree authorizing conveyance of royalty interest provided that the guardian should make due report to the chancellor for confirmation. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Jurisdiction to authorize guardian to execute mineral lease and to convey a one-half royalty interest in realty belonging to guardian's minor children and wards, followed domicil of the guardian-parent, although two of the minors lived at home of a great-grandfather in another county wherein the realty was located. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Prior to the enactment of this section as it now stands, sales were upon public bids, and the cognate statutory requirements are to be construed as contemplating such procedure. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Act of 1930 (Laws, 1930, ch 42, § 2), providing that such act was supplemental to any other act relating to sales of real and personal property by a decree of chancery courts, was repealed by chapter 327 of Laws, 1936, and recast in the form now appearing in this section (Code 1942, § 1389). Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

This section cannot be construed to authorize the court to permit the person making the sale to become the purchaser thereat, thereby imposing upon him inconsistent rights and duties. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711, 159 So. 407, 1934 Miss. LEXIS 385 (Miss. 1934).

In action on notes secured by collateral, decree directing sale of collateral held erroneous in permitting plaintiff to purchase collateral at sale to be made by it. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711, 159 So. 407, 1934 Miss. LEXIS 385 (Miss. 1934).

In judicial sales of property pledged as security for debts, to be made by persons other than pledgee, decree may permit pledgee to purchase, but pledgee cannot purchase at his own sale without consent of pledgor. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711, 159 So. 407, 1934 Miss. LEXIS 385 (Miss. 1934).

2. Setting sale aside.

Legal fraud upon the court must be shown by clear and convincing testimony in order to warrant setting aside decree authorizing guardian of minors to execute upon terms approved by the court a mineral lease and conveyance of one-half royalty interest in realty belonging to the minors. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Legal fraud upon the court which will warrant setting aside decree authorizing guardian to sell at private sale mineral lease and royalty interest in realty belonging to the minor wards, upon the terms disclosed in the guardian's petition, may not be shown by a mere failure to disclose information which the court should have known, but must be shown only by a deliberate withholding of facts which the purchaser knew and the disclosure of which would have revealed that the wards had been cheated of their rights by means that were unfair and unequitable, and at a value that was then inadequate. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

The test of adequacy of consideration paid at private sale of mineral lease and royalty interests in realty belonging to minor wards, pursuant to court authority, is the reasonable value at the time of the sale and not by subsequent developments. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

There is no finality to a decree for private sale or lease of mineral rights and royalties in realty belonging to minor wards as immunizes it to attack upon the ground of fraud of which a gross inadequacy of consideration is an element. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

After a sale of property by decree of the chancery court, a mere increase of price or inadequacy of price at the time of sale will not alone justify the court in setting it aside, although such inadequacy or increase in connection with unfairness, injustice or inequity in making the sale would be sufficient. Bethea v. Rahaim, 196 Miss. 15, 16 So. 2d 633, 1944 Miss. LEXIS 167 (Miss. 1944).

Chancery court was correct in setting aside receiver's private sale of certain property of insolvent and ordering another sale where inadequacy of sale price was coupled with unfairness in failing to give notice of the time and place of sale to creditors holding a recorded purchase money reserve title contract lien against such property. Bethea v. Rahaim, 196 Miss. 15, 16 So. 2d 633, 1944 Miss. LEXIS 167 (Miss. 1944).

RESEARCH REFERENCES

ALR.

Power of sale conferred on executor by testator as authorizing private sale. 11 A.L.R.2d 955.

Am. Jur.

47 Am. Jur. 2d (Rev), Judicial Sales § 7.

CJS.

30A C.J.S., Equity §§ 48, 51, 52.

50A C.J.S., Judicial Sales §§ 1-6.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

§§ 11-5-119 and 11-5-121. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-5-119. [Codes, 1871, § 1034; 1880, § 1896; 1892, § 556; 1906, § 607; Hemingway's 1917, § 367; 1930, § 472; 1942, § 1393]

§ 11-5-121. [Codes, Hutchinson's 1848, ch. 57, art. 1 (15); 1857, ch. 57, art. 16; 1871, § 2160; 1880, § 2681; 1892, § 2751; 1906, § 3111; Hemingway's 1917, § 2475; 1930, § 2322; 1942, § 752]

Editor's Notes — Former § 11-5-119 authorized the staying of proceedings on a bill of review.

Former § 11-5-121 required that bills of review be filed within two years after the date of the final decree.

§ 11-5-123. New bond required when security insufficient in certain cases.

When it shall be alleged that the security on an injunction or receiver's bonds, or any bond taken upon any proceeding in the chancery court, is insufficient, the chancellor shall have power to hear and determine the same in vacation, as well as in term time, and may order the injunction to be dissolved, or the receiver to be suspended or removed, or may make such other order as may be just and equitable in the case, unless a new bond with sufficient sureties be given within twenty days, or such time as he shall appoint; but if done in vacation, at least five days' notice of the time and place of making the application shall be given to the opposite party.

HISTORY: Codes, 1880, § 1897; 1892, § 583; 1906, § 634; Hemingway's 1917, § 394; 1930, § 444; 1942, § 1364.

JUDICIAL DECISIONS

1. In general.

Power to release sureties or require new bond is purely statutory. United States Fidelity & Guaranty Co. v. Felder, 105 Miss. 283, 62 So. 236, 1913 Miss. LEXIS 203 (Miss. 1913).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 71, 72, 73.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 91-93.

CJS.

75 C.J.S., Receivers § 66.

RECEIVERS

Sec.	
11-5-151.	Receivers may be appointed or removed in vacation.
11-5-153.	Receiver not appointed without notice.
11-5-155.	Complainant to give bond before receiver appointed without notice.
11-5-157.	Bond in lieu of receiver.
11-5-159.	Bond of receiver.

Sec.
11-5-161. Receivers subject to orders of court, and may apply therefor in vacation.
11-5-163. Receiver of estate of decedent, minor.
11-5-165. Receiver of money paid into court.
11-5-167. Compensation of receiver.

§ 11-5-151. Receivers may be appointed or removed in vacation.

Receivers may be appointed by the chancellor in vacation, as well as by the chancery court in term time; and any receiver may be removed by the chancellor in vacation, as well as by the chancery court in term time; but before any receiver shall be so removed in vacation, the party applying therefor must give the adverse party, or his solicitor, and the receiver five days' notice of the time and place of presenting such application; such application may be heard in term time on two days' notice.

HISTORY: Codes, 1892, § 576; 1906, § 627; Hemingway's 1917, § 387; 1930, § 435; 1942, § 1355.

Cross References — Reduction or cancellation of receiver's bond in vacation, see § 9-5-103.

Requirement of bond upon removal of receiver, see § 11-5-157.

Appointment of receiver for nonresident or unknown owners of mineral interests, see § 11-17-33.

Appointment of trustees upon judgment of forfeiture and ouster, see §§ 11-39-25 through 11-39-39.

Jurisdiction of chancery court to issue injunction and appoint receiver under Medicaid Fraud Control Act, see § 43-13-227.

Receivership of bank, see §§ 81-9-17 to 81-9-37.

Receivership of insolvent insurance company, see §§ 83-23-1 to 83-23-9.

Receivership for burial associations, see § 83-37-31.

Administration of assignments for benefit of creditors, see §§ 85-1-1 to 85-1-19.

Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Right of appeal.

1. In general.

Plaintiff must show, first, he has clear right to the property, or a lien upon it, or that it constitutes a special fund to which he has a right to resort, and, second, that defendant's possession obtained by fraud, or property or income therefrom is in danger of loss from neglect, waste, misconduct, or insolvency of defendant. Clark v. Fleming, 130 Miss. 504, 94 So. 458, 1922 Miss. LEXIS 228 (Miss. 1922).

Liens and priorities acquired before appointment of receiver will not be disturbed. P. E. Payne Hardware Co. v. International Harvester Co., 110 Miss. 783, 70 So. 892, 1916 Miss. LEXIS 199 (Miss. 1916).

Appointment of receiver is always within the sound discretion of the court, but the necessity therefor should be clear and the interest of all parties considered.

Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018, 1912 Miss. LEXIS 244 (Miss. 1912).

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. Levy v. T. R. Rosell & Co., 82 Miss. 527, 34 So. 321, 1903 Miss. LEXIS 154 (Miss. 1903).

2. Right of appeal.

The statutes have been so altered that an appeal from a decree discharging a receiver may now be taken. Pearson v. Kendrick, 74 Miss. 235, 21 So. 37, 1896 Miss. LEXIS 147 (Miss. 1896).

Under the Code of 1880, which left the appointment and discharge of receivers wholly to the discretion of the court, an appeal did not lie from an order of the chancellor discharging the receiver. Hanon v. Weil, 69 Miss. 476, 13 So. 878, 1891 Miss. LEXIS 175 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Appointment of receiver at instance of plaintiffs in tort action. 4 A.L.R.2d 1278.

Appealability of order appointing, or refusing to appoint, receiver. 72 A.L.R.2d 1009.

Appealability of order discharging, or vacating appointment of, or refusing to discharge, or vacate appointment of, receiver. 72 A.L.R.2d 1075.

What constitutes waste justifying appointment of receiver of mortgaged property. 55 A.L.R.3d 1041.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 A.L.R.4th 224.

Federal receivers of property in different districts under 28 USCS § 754. 57 A.L.R. Fed. 621.

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 150- 154.

65 Am. Jur. 2d, Receivers §§ 146-150.

13B Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:252.1 (appointment of receiver).

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 1 et seq., 21 et seq, 351 et seq.

CJS.

75 C.J.S., Receivers §§ 39-43, 78-81.

§ 11-5-153. Receiver not appointed without notice.

A receiver shall not be appointed without the party praying the appointment having given the opposite party at least five days' notice of the time and place of making the application, unless it shall appear that an immediate appointment is necessary, or good cause be shown for not giving notice.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 19 (1); 1857, ch. 62, art. 74; 1871, § 1052; 1880, § 1921; 1892, § 574; 1906, § 625; Hemingway's 1917, § 385; 1930, § 436; 1942, § 1356.

Cross References — Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Necessity of notice.
3. Appointment without notice.

1. In general.

The conditions which must be shown in order to entitle a stockholder to have a dissolution of a corporation and a receiver appointed are the insolvency of the corporation, or that the corporation ceases to be a going concern, or while not solvent the corporation sells its franchises in whole or in part. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

Receiver not appointed at instance of simple contract creditor without lien. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447, 1925 Miss. LEXIS 286 (Miss. 1925).

Receivership never primary object of suit. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447, 1925 Miss. LEXIS 286 (Miss. 1925).

Appointment not independent equity, but auxiliary remedy. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447, 1925 Miss. LEXIS 286 (Miss. 1925).

Appointment discretionary and exercised as auxiliary to attainment of justice. Clark v. Fleming, 130 Miss. 504, 94 So. 458, 1922 Miss. LEXIS 228 (Miss. 1922).

The appointment of a receiver can only be made in a pending cause. It cannot be made before the bill is filed. Barber v. Manier, 71 Miss. 725, 15 So. 890, 1894 Miss. LEXIS 27 (Miss. 1894); Smith v. Ely & Walker Dry Goods Co., 79 Miss. 266, 30 So. 653, 1901 Miss. LEXIS 54 (Miss. 1901).

2. Necessity of notice.

A receiver should not be appointed without due regard to the rights of the defendant as well as complainant and never without notice unless the necessity is urgent. Buckley v. Baldwin, 69 Miss. 804, 13 So. 851, 1892 Miss. LEXIS 48 (Miss. 1892).

3. Appointment without notice.

Chancellor was justified in terminating the receivership and returning the assets to the corporation where the entire proceedings wherein the dissolution of the corporation was ordered and the receiver appointed were void for want of notice to other stockholders, and for failure to post the receiver's bond, without regard to the fact that the president and vice president, who were majority stockholders of the corporation, failed to testify in the case. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

An order for the dissolution of a corporation and the appointment of a receiver was void where the petition for the dissolution of the corporation and the appointment of the receiver did not allege the existence of any emergency justifying the appointment of a receiver without notice, and the president and vice-president, who owned the majority of the stock, were not given notice, and no bond was executed, as required by Code 1942, § 1357. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

Only gravest emergency justifies appointment of receiver without notice. Burton v. Pepper, 116 Miss. 139, 76 So. 762, 1917 Miss. LEXIS 291 (Miss. 1917).

Unsecured creditor cannot secure appointment of receiver, without notice, by simply showing execution of deeds of trust by debtor firm to other creditors. Lawrence Lumber Co. v. A. J. Lyon & Co., 93 Miss. 859, 47 So. 849, 1908 Miss. LEXIS 161 (Miss. 1908).

Where a receiver has been appointed without notice by the chancellor of another district, it will be presumed on a recital to that effect in the chancellor's order that the showing required by statute to authorize such action was made. Pearson v. Kendrick, 74 Miss. 235, 21 So. 37, 1896 Miss. LEXIS 147 (Miss. 1896).

The court cannot appoint a receiver for a bank on its ex parte application, though it is insolvent. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33, 1894 Miss. LEXIS 4 (Miss. 1894).

Appointment of a receiver, without notice and before process served, on bill by execution creditors against debtor and claimants under trust deeds, alleging that defendants were conspiring to hinder and delay the complainants until the secured debts should mature and the property could be sold and bought by such secured claimants, was erroneous, since any wrongful disposition of the property could be prevented by injunction. Meridian News & Pub. Co. v. Diem Wing Paper Co., 70 Miss. 695, 12 So. 702, 1893 Miss. LEXIS 21 (Miss. 1893).

RESEARCH REFERENCES

ALR.

Appealability of order appointing, or refusing to appoint, receiver. 72 A.L.R.2d 1009.

Appealability of order discharging, or vacating appointment of, or refusing to discharge, or vacate appointment of, receiver. 72 A.L.R.2d 1075.

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 64, 66, 67— 69.

13B Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:252.1 (appointment of receiver).

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 1-4.

CJS.

75 C.J.S., Receivers §§ 44-53.

§ 11-5-155. Complainant to give bond before receiver appointed without notice.

Before any receiver shall be appointed without notice, the party applying for the appointment shall execute bond, payable to the adverse party, in a sufficient penalty to be fixed by the court or chancellor, with sufficient sureties, conditioned to pay all damages that may be sustained by the appointment of such receiver in case the appointment be revoked; and said bond shall be filed in the cause, and damages may be recovered thereon in the suit in the same manner as damages are recoverable on an injunction bond or the party entitled to damages may maintain an independent suit on such bond for such damages.

HISTORY: Codes, 1892, § 575; 1906, § 626; Hemingway's 1917, § 386; 1930, § 437; 1942, § 1357.

Cross References — Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The conditions which must be shown in order to entitle a stockholder to have a dissolution of a corporation and a receiver appointed are the insolvency of the corporation, or that the corporation ceases to be a going concern, or while not solvent the corporation sells its franchises in whole or in part. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

An order for the dissolution of a corporation and the appointment of a receiver was void where the petition for the dissolution of the corporation and the appointment of the receiver did not allege the existence of any emergency justifying the appointment of a receiver without notice, and the president and vice-president, who owned the majority of the stock, were not given notice, and no bond was executed, as required by this section [Code 1942, § 1357]. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

Chancellor was justified in terminating the receivership and returning the assets to the corporation where the entire proceedings wherein the dissolution of the corporation was ordered and the receiver appointed were void for want of notice to other stockholders, and for failure to post the receiver's bond, without regard to the fact that the president and vice president, who were majority stockholders of the corporation, failed to testify in the case. Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 99 So. 2d 660, 1958 Miss. LEXIS 300 (Miss. 1958).

Upon decree discharging receiver complainant is liable on the bond for all damages sustained because of appointment. Pearson v. Kendrick, 74 Miss. 235, 21 So. 37, 1896 Miss. LEXIS 147 (Miss. 1896).

RESEARCH REFERENCES

CJS.
75 C.J.S., Receivers § 61.

§ 11-5-157. Bond in lieu of receiver.

On an application for the appointment of a receiver, the court or chancellor may, in the exercise of sound discretion, in lieu of a receiver, order that the party against whom the receiver is asked, execute bond, to be approved by the court or chancellor, payable to the party who asks for the appointment, with sufficient sureties, in a sufficient penalty, to be fixed by the court or chancellor, conditioned according to the nature of the case, as the court or chancellor may direct. Upon the execution, approval, and filing of such bond, the receiver shall not be appointed; and any decree rendered in the cause on final hearing against the principal obligor in the bond shall be rendered against the sureties therein, within the scope of its conditions and penalty. On an application to remove a receiver who shall have been appointed without notice, the court or chancellor may exercise the same discretion, and, in lieu of retaining the receiver, may remove him upon the execution, approval, and filing of such bond; and decree may be rendered thereon as if given on the application for the appointment of a receiver.

HISTORY: Codes, 1892, § 578; 1906, § 629; Hemingway's 1917, § 389; 1930, § 438; 1942, § 1358.

Cross References — Receivers, see Miss. R. Civ. P. 66.
Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.
65 Am. Jur. 2d, Receivers § 74.

CJS.
75 C.J.S., Receivers § 61.

§ 11-5-159. Bond of receiver.

Every receiver, when appointed, shall, before being authorized to act as such, give bond, payable to the state, in such penalty and with such sureties as may be approved by the court or chancellor, conditioned that he will in all things faithfully discharge the duties of his office as receiver; which bond shall be filed with the clerk of the court, and may be put in suit, in the name of the state, for the use of the party aggrieved, from time to time, until the whole penalty shall be recovered.

HISTORY: Codes, 1857, ch. 62, art. 75; 1871, § 1053; 1880, § 1922; 1892, § 579; 1906, § 630; Hemingway's 1917, § 390; 1930, § 439; 1942, § 1359.

Cross References — Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 71, 72, 73.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 91-93.

CJS.

75 C.J.S., Receivers § 66.

§ 11-5-161. Receivers subject to orders of court, and may apply therefor in vacation.

Receivers shall be subject to the orders, instructions, and decrees of the court, and of the chancellor in vacation; and they, or any party in interest, may apply therefor in term time, or to the chancellor in vacation, or for modifications of previous orders or instructions; and obedience thereto may be enforced by attachment.

HISTORY: Codes, 1857, ch. 62, art. 77; 1871, § 1055; 1880, § 1924; 1892, § 577; 1906, § 628; Hemingway's 1917, § 388; 1930, § 440; 1942, § 1360.

Cross References — Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Receiver not liable for disbursement of funds under order of court. United States Fidelity & Guaranty Co. v. McCain, 136 Miss. 30, 136 Miss. 306, 101 So. 197, 1924 Miss. LEXIS 113 (Miss. 1924).

Order by chancellor in vacation instructing receiver to sell property may be made in any county or court in which receivership situated. Cashin v. Murphy, 132 Miss. 834, 96 So. 747, 1923 Miss. LEXIS 82 (Miss. 1923).

Court may appoint receiver for solvent corporation upon petition of minority stockholders on a showing of maladministration by officers appointed by majority and if shown to be necessary to wind up business. Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018, 1912 Miss. LEXIS 244 (Miss. 1912).

Under the facts of the case, a decree authorizing a receiver to continue the publication of a newspaper was held to be too broad. Meridian News & Pub. Co. v. Diem Wing Paper Co., 70 Miss. 695, 12 So. 702, 1893 Miss. LEXIS 21 (Miss. 1893).

RESEARCH REFERENCES

ALR.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership. 20 A.L.R.3d 967.

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 144- 146.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 101 et seq., 161.

CJS.
75 C.J.S., Receivers §§ 112-115, 119, 155–158.

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-5-163. Receiver of estate of decedent, minor.

In all cases in which it may be thought to be necessary for the protection of the estate of decedents, minors, and persons of unsound mind, a receiver may be appointed, either by the court or by the chancellor in vacation, subject to the provisions of sections 11-5-151 to 11-5-161.

HISTORY: Codes, 1880, § 1926; 1892, § 581; 1906, § 632; Hemingway's 1917, § 392; 1930, § 441; 1942, § 1361.

Cross References — Appointment of guardian ad litem for infants or defendants of unsound mind, see § 9-5-89.

Appointment of guardian for minors, see § 93-13-13.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
Receiver should not be appointed in estate matter because executor or administrator is derelict. Huston v. King, 119 Miss. 347, 80 So. 779, 1919 Miss. LEXIS 7 (Miss. 1919).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators §§ 869, 870 , 875.
21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Form 22.

CJS.
43 C.J.S., Infants § 461.

§ 11-5-165. Receiver of money paid into court.

When money shall be paid into court under its order, a receiver may be appointed to keep the same, who shall give bond and security as in other cases; but if the money shall be ordered to be paid to the clerk of such court, his official bond shall cover it, and an additional bond may be required if the court or chancellor shall think proper.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 19 (5); 1857, ch. 62, art. 78; 1871, § 1056; 1880, § 1925; 1892, § 580; 1906, § 631; Hemingway's 1917, § 391; 1930, § 442; 1942, § 1362.

Cross References — Additional bond for money received by circuit court clerk, see § 9-7-121.

Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

A federal interpleader action brought in its own jurisdiction by a nonresident judgment debtor of an insolvent Mississippi judgment creditor was dismissed where, under Code 1942, §§ 1362 and 2804, ample procedures existed for the protection of the judgment debtor's rights in Mississippi. Hansen v. Mathews, 424 F.2d 1205, 1970 U.S. App. LEXIS 10987 (7th Cir. Wis.), cert. denied, 397 U.S. 1057, 90 S. Ct. 1404, 25 L. Ed. 2d 675, 1970 U.S. LEXIS 2256 (U.S. 1970).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 71, 72, 73.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 91-93.

CJS.

75 C.J.S., Receivers § 66.

§ 11-5-167. Compensation of receiver.

Receivers shall be entitled to have such compensation for their services as the court shall allow, and shall have a lien upon the property in their hands for the payment thereof, and of their necessary expenses. The court shall make such order to compel the payment thereof as may be just and necessary, and may decree the payment thereof by any of the parties as a portion of the costs of the suit.

HISTORY: Codes, 1857, ch. 62, art. 76; 1871, § 1054; 1880, § 1923; 1892, § 582; 1906, § 633; Hemingway's 1917, § 393; 1930, § 443; 1942, § 1363.

Cross References — Receivers, see Miss. R. Civ. P. 66.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Lien.

1. In general.

An attorney employed by the receiver under a general assignment held entitled to compensation under the facts and conditions described. Tishomingo Sav. Inst. v. Allen, 76 Miss. 114, 23 So. 305, 1898 Miss. LEXIS 52 (Miss. 1898).

Only such expenses as are incurred in benefiting or preserving the estate may be allowed. Counsel fees incurred in an unsuccessful defense of an assignment against creditors cannot be. An allowance may be made for the services of the assignee in a general assignment under the code, who is made by the statute a receiver. Perry Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 So. 171, 1894 Miss. LEXIS 131 (Miss. 1894).

2. Lien.

Code 1942, § 1363 does not create a lien by operation of law which would follow the property out of the receivership and survive the termination of the receivership proceedings. In re Anglo-American Properties, Inc., 460 F.2d 212, 1972 U.S. App. LEXIS 9716 (5th Cir. Miss. 1972).

RESEARCH REFERENCES

ALR.

Costs and other expenses incurred by fiduciary whose appointment was improper as chargeable against estate. 4 A.L.R.2d 160.

Measure and amount of compensation of receiver appointed by federal court. 6 A.L.R. Fed. 817.

Am. Jur.

65 Am. Jur. 2d, Receivers §§ 234-288.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Forms 301-304.

CJS.

75 C.J.S., Receivers §§ 449-452.

Law Reviews.

1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March 1979.

CHAPTER 7.

PRACTICE AND PROCEDURE IN CIRCUIT COURTS

In General. 11-7-1
Uniform Enforcement of Foreign Judgments. 11-7-301

IN GENERAL

Sec.	
11-7-1.	Provisions applicable to all courts.
11-7-3.	Assignee of chose in action may sue.
11-7-5.	Assignee's action not prejudicial by set-off.
11-7-7.	Transfer of chose in action after filing.
11-7-9.	Action for seduction of a woman.
11-7-11.	Action for seduction of a child.
11-7-12.	Civil penalty recoverable for violation of bad check statute; applicability to electronic transfers of funds.
11-7-13.	Actions for injuries producing death.
11-7-15.	Contributory negligence no bar to recovery of damages; jury may reduce damages.
11-7-17.	Questions of negligence and contributory negligence for jury.
11-7-18.	Limitation of remedies or disclaimer of liability as to certain implied warranties in sale to consumer of consumer goods prohibited.
11-7-19.	No assumption of risk by employee when the master is negligent; exception as to certain employees.
11-7-20.	Privity unnecessary to maintain actions in negligence, strict liability or breach of warranty.
11-7-21 through 11-7-27.	Repealed.
11-7-29.	Death of one defendant after judgment.
11-7-31 through 11-7-39.	Repealed.
11-7-41.	Defendants may be sued by initials in certain cases.
11-7-43.	Averment that partners contracted by a name affixed to a writing is sufficient.
11-7-45 through 11-7-65.	Repealed.
11-7-67.	Balance of mutual dealings on death of one party.
11-7-69 and 11-7-71.	Repealed.
11-7-73.	Disclaiming title and tendering of amends in action for trespass.
11-7-75 through 11-7-105.	Repealed.
11-7-107.	How private way may be pleaded.
11-7-109 through 11-7-129.	Repealed.
11-7-131.	Cases may be taken under judicial advisement.
11-7-133.	Repealed.
11-7-135.	Exceptions in trials by court — either party may appeal.
11-7-137 through 11-7-145.	Repealed.
11-7-147.	Opening statements allowed.
11-7-149.	Court officers not to converse with jurors.
11-7-151.	Trial — jury may take evidence to jury room.
11-7-153.	Repealed.
11-7-155.	Judge not to sum up or comment on testimony or charge jury.
11-7-157.	No special form of verdict required.
11-7-159.	Verdict may be reformed at the bar if informal or defective.
11-7-161.	If verdict not responsive, jury to deliberate further.
11-7-163.	No error if verdict omits something.

Sec.
11-7-165. Award of damages in civil action against person who steals, embezzles, extorts or converts certain property of vulnerable adult; "position of trust" defined.
11-7-167. Repealed.
11-7-169. Judgment—remedial orders.
11-7-171. Repealed.
11-7-173. Judgment on bonds.
11-7-175. Liability of ships and vessels for causing death or injury.
11-7-177 and 11-7-179. Repealed.
11-7-181. Office confession of judgment; how made.
11-7-183. Office confession of judgment; how made final.
11-7-185. Office confession of judgment; void in certain cases.
11-7-187. Judgment on confession as release of errors.
11-7-189. Enrollment of judgments; satisfaction.
11-7-191. Enrolled judgment as lien.
11-7-193. How priority of lien forfeited.
11-7-195. Judgment not a lien out of county unless enrolled.
11-7-197. Judgment not a lien in county until enrolled.
11-7-199. Growing crop not subject to judgment lien.
11-7-201. Revival not necessary for execution.
11-7-203 through 11-7-209. Repealed.
11-7-211. Bills of exception may be amended.
11-7-213 and 11-7-215. Repealed.
11-7-217. Executions of fines, penalties, and forfeitures.
11-7-219. Remedy against officers, failing to return fines.
11-7-221. Liability of officers for default as to fines.

§ 11-7-1. Provisions applicable to all courts.

All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

HISTORY: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; 1906, § 687; Hemingway's 1917, § 465; 1930, § 474; 1942, § 1412.

Cross References — Other sections derived from same 1942 code section, see §§ 11-1-57, 11-11-1.

Judges, terms, general powers and duties of circuit court, see § 9-7-1 et seq.

Trial of right of property, see § 11-23-1 et seq.

Attachment at law against debtors, see § 11-33-1 et seq.

Garnishment proceedings, see § 11-35-1 et seq.

Action of replevin, see § 11-37-1 et seq..

Quo warranto proceedings, see § 11-39-1 et seq.

Mandamus and writs of prohibition, see § 11-41-1 et seq.

Habeas corpus proceedings, see § 11-43-1 et seq.

Suits against state or its political subdivisions, see § 11-45-1 et seq.

Rules of evidence generally, see § 13-1-1 et seq.

Process, publication and notice generally, see § 13-3-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Procedural rules applicable to practice in Mississippi circuit and county courts, see URCCC 1.01 et seq.

Procedural rules for criminal proceedings in all Mississippi trial courts, see MRCrP 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Venue.
3. Dismissal.
4. Evidence.

1. In general.

In view of the section [Code 1942, § 1412] and Code 1930, §§ 575, 1397 case held triable at return term of circuit court, where summons was served July 21 and made returnable August 20, as against contention that both day of service and day of return had to be excluded. Mississippi C. R. Co. v. Aultman, 173 Miss. 622, 160 So. 737, 1935 Miss. LEXIS 205 (Miss. 1935).

By this section [Code 1942, § 1412], the provisions of the chapter are made applicable to all courts, and this embraces the county court; and, accordingly, conviction on a plea of guilty entered on an amendable affidavit is good and cannot be set aside on certiorari because of a defective affidavit. Bogle v. State, 155 Miss. 612, 125 So. 99, 1929 Miss. LEXIS 347 (Miss. 1929).

2. Venue.

In view of this section [Code 1942, § 1412], a fraternal benefit association may be sued in the chancery court of the county in which the beneficiary resides. Masonic Ben. Ass'n v. Dotson, 111 Miss. 60, 71 So. 266, 1916 Miss. LEXIS 240 (Miss. 1916).

3. Dismissal.

Where a suit was brought in chancery court for cancelation of a conveyance on the ground that it has never been delivered, the chancellor should have granted the complainant's motion for voluntary dismissal without prejudice where there was no submission to the chancellor for final decision on merits. Graham v. Graham, 214 Miss. 99, 58 So. 2d 85, 1952 Miss. LEXIS 449 (Miss. 1952).

A complainant in the chancery court has the right under the statute to dismiss his suit without prejudice. This rule applies in all cases where the defendant will not be prejudiced by a dismissal. Adams v. Lucedale Commercial Co., 113 Miss. 608, 74 So. 435, 1917 Miss. LEXIS 137 (Miss. 1917); Adams v. Dean, 74 So. 436 (Miss. 1917); Adams v. Leatherbury, 74 So. 436 (Miss. 1917); Adams v. McInnis, 74 So. 436 (Miss. 1917).

4. Evidence.

Under the provisions of this section [Code 1942, § 1412], Code 1942, § 1469 is applicable to suits in the chancery court. General Acceptance Corp. v. Holbrook, 254 Miss. 78, 179 So. 2d 845, 1965 Miss. LEXIS 927 (Miss. 1965).

In action of unlawful entry and detainer, introduction in evidence of deed to plaintiff held not objectionable on ground that no copy of deed was filed as exhibit to declaration, since statute (Code 1930, § 3458) made no such requirement. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Statutes requiring copy of writing to be annexed to declaration or bill before evidence of writing may be introduced applies to chancery court as well as to circuit court. Thomas v. B. Rosenberg & Sons, Inc., 153 Miss. 314, 120 So. 732, 1929 Miss. LEXIS 18 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Pleading and proof of law of foreign country. 75 A.L.R.3d 177.

Am. Jur.

20 Am. Jur. 2d, Courts §§ 29, 30 et seq.

CJS.

21 C.J.S., Courts §§ 188-245.

Law Reviews.

The Limits of the Mississippi Supreme Court's Rule-Making Authority. 60 Miss. L. J. 359, Fall 1990.

§ 11-7-3. Assignee of chose in action may sue.

The assignee of any chose in action may sue for and recover on the same in his own name, if the assignment be in writing. In case of a transfer or an assignment of any interest in such chose in action before or after suit brought, the action may be begun, prosecuted and continued in the name of the original party, or the court may allow the person to whom the transfer or assignment of such interest has been made, upon his application therefor, to be substituted as a party plaintiff in said action. If in any case a transfer or assignment of interest in any demand or chose in action be made in writing before or after suit is filed, to an attorney or firm of attorneys, appearing in the case, it shall be sufficient notice to all parties of such assignment or transfer, if such assignment or transfer be filed with the papers in said cause, and such attorney or attorneys shall not be required to be made parties to said suit. An "assignee" for purposes of this section includes both absolute assignees, with or without recourse, and conditional or limited assignees including assignees for collection purposes.

HISTORY: Codes, Hemingway's 1917, § 497; 1930, § 505; 1942, § 1448; Laws, 1916, ch. 134; Laws, 2001, ch. 359, § 1, eff from and after July 1, 2001.

Cross References — Benefits carried with assignment of negotiable instruments, see § 75-13-1.

Effect of releasing one or more joint debtors, see § 85-5-1.

Provision that no action shall be dismissed on ground that it is not prosecuted in name of real party in interest until reasonable time has been allowed after objection for ratification of commencement of action by, or joinder or substitution of, real party in interest, see Miss. R. Civ. P. 17.

Substitution of parties generally, see Miss. R. Civ. P. 25.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Rights assignable.
3. Assignment to attorney.
4. Necessity of assignment in writing.
5. Suit by or in the name of assignor.
6. Right of assignee to sue.
7. Assignment pendente lite.
8. Rights of assignor and assignee inter se.
9. Payment or settlement of claim after assignment.
10. Evidence.
11. Parties.
12. Limitation of actions.

1. In general.

Pursuant to a divorce, the property settlement agreement provided that each party released the other party from all claims through the date of the agreement, and referenced civil or criminal actions; the agreement was an appropriate location for a release of claims to appear, the claims that were the subject of the agreement were "choses in action," and the trial court properly held that the contractual agreement precluded the wife's suit for personal injuries based on a pre-divorce assault by the husband. Martinez v. Martinez, 860 So. 2d 1247, 2003 Miss. App. LEXIS 1151 (Miss. Ct. App. 2003).

In a cause of action based upon an open account for merchandise sold and delivered by the receiver of a bankrupt company to the defendant, where the declaration alleges that there was proper assignment under the authority of a proper decree of a chancery court, the failure of the plaintiff to file a copy of the order appointing the receiver and a copy of order authorizing sale of assets of the bankrupt company receivership to the plaintiff, with the declaration, does not constitute such a defect as to require a reversal of a default judgment. Britton v. Magnolia State Casket & Supply Co., 210 Miss. 264, 49 So. 2d 404, 1950 Miss. LEXIS 346 (Miss. 1950).

Statute regarding right of assignee of chose in action to sue in his own name held not applicable to suits in equity to enforce right of subrogation. Box v. Early, 181 Miss. 19, 178 So. 793 (Miss. 1938).

Statute (Code 1942, § 1450), requiring that assignment of chose in action be in writing, filed with papers, held not in conflict with this section [Code 1942, § 1448] authorizing institution or continuance of action in assignor's name. Solomon v. Continental Baking Co., 174 Miss. 890, 165 So. 607, 166 So. 376, 1936 Miss. LEXIS 215 (Miss. 1936).

2. Rights assignable.

Trial court did not err in failing to recognize and apply the waiver, joinder and assignment documents signed by a mother's children regarding her claims for child support arrearages on their behalves because although Miss. Code Ann. § 11-7-3 allowed for the assignment of choses in action, the child support benefits belonged to the children with the mother serving only in a fiduciary capacity. Ladner v. Logan, 857 So. 2d 764, 2003 Miss. LEXIS 551 (Miss. 2003).

Because a wrongful death claim accrued at death, a decedent could not have assigned it – or the personal injury component of the wrongful death claim that survived her death pursuant to Miss. Code Ann. § 11-7-13 – to her ex-husband under Miss. Code Ann. § 11-7-3. England v. England (In re Estate of England), 846 So. 2d 1060, 2003 Miss. App. LEXIS 473 (Miss. Ct. App. 2003).

A claim against an insurance company for bad faith is assignable. Kaplan v. Harco Nat'l Ins. Co., 708 So. 2d 89 (Miss. Ct. App.), op. withdrawn, 716 So. 2d 673, 1998 Miss. App. LEXIS 139 (Miss. Ct. App. 1998).

Holder of mortgage on property destroyed by fire could properly assign its interest in any claims and/or causes of action against insurance company arising out of loss to the property owner, with property owner remaining fully liable to mortgagee for amount still owed on mortgage, and such assignment is not champertous, as property owners who obtain assignment from mortgage company are not strangers to litigation against insurance company and have asserted interest separate and distinct from interest of mortgagee; in issues of propriety of assignment and claims of champerty, analysis is not focused on relationship between assignee and assignor but rather relationships between assignor and insurance company and assignees and insurance company. Stephen R. Ward, Inc. v. United States Fidelity & Guaranty Co., 681 F. Supp. 389, 1988 U.S. Dist. LEXIS 1902 (S.D. Miss. 1988).

Under this provision, a cause of action for personal injuries may be assigned in part, and no unjust enrichment is involved in permitting recovery in excess of the amount due the assignee. Farmer v. Humphreys County Memorial Hospital, 236 Miss. 35, 109 So. 2d 356, 1959 Miss. LEXIS 291 (Miss. 1959).

The right of a borrower in case of usury to recover the principal and interest is not assignable. Fry v. Layton, 191 Miss. 17, 2 So. 2d 561, 1941 Miss. LEXIS 138 (Miss. 1941).

Landowner's right to recover for cutting timber is assignable; deed conveying land with all rights of action accrued or to accrue, for depredation and trespasses, assigned right of action for wrongful cutting timber prior thereto. J. H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593, 1928 Miss. LEXIS 127 (Miss. 1928).

Action for recovery of personal property or to enforce contract or recover damages for breach of contract or for injury to person or property survives, and is assignable; pure penalty intended as punishment for misconduct does not survive, and is not assignable. J. H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593, 1928 Miss. LEXIS 127 (Miss. 1928).

An injured person may assign his claim for damages. Reese v. Salmon, 99 So. 382 (Miss. 1924).

The vendor of standing timber, acquiescing in the assignment of the contract of sale thereof, is estopped to deny the assignability of a claim. Young v. Adams, 122 Miss. 1, 84 So. 1, 1920 Miss. LEXIS 412 (Miss. 1920).

A valid claim for personal injuries may be assigned. Wells v. Edwards H. & C. R. Co., 96 Miss. 191, 50 So. 628, 1909 Miss. LEXIS 42 (Miss. 1909).

The right given to nonresident defendants against whom a final decree has been rendered to apply for a new hearing within two years is assignable and may be exercised by the assignee. Fink v. Henderson, 74 Miss. 8, 19 So. 892, 1896 Miss. LEXIS 97 (Miss. 1896).

A covenant not to re-engage in the insurance business is assignable and may be enforced by the assignee. Klein v. Buck, 73 Miss. 133, 18 So. 891, 1895 Miss. LEXIS 104 (Miss. 1895).

3. Assignment to attorney.

Where an attorney who, under a contract with his client, had obtained an assignment of a 50 per cent interest in the client's cause of action against the defendant, or a 50 per cent contingent fee in the amount that might be recovered therein, had failed to file his contract in compliance with this section [Code 1942, § 1448], and in an action upon the alleged assignment, defendant, who had obtained a written settlement and release from the client, answered he had no knowledge of the contract between the attorney and the client at the time of his settlement with the client, the trial court properly sustained defendant's plea in bar, in view of ample evidence to support the finding as to the absence of knowledge on the defendant's part at the time of the release. Cumbest v. Kaufman, 230 Miss. 713, 93 So. 2d 857, 1957 Miss. LEXIS 413 (Miss. 1957).

Absent assignment to attorneys of interest in cause of action, complainant in good faith may dismiss suit without attorneys' consent, notwithstanding attorneys' fee is contingent. Zerkowsky v. Zerkowsky, 160 Miss. 278, 131 So. 647, 1931 Miss. LEXIS 121 (Miss. 1931).

4. Necessity of assignment in writing.

Real party in interest was company which had allegedly sold its stock to another company, and not company purchasing stock, where, other than proposal to buy stock and order of bankruptcy court accepting such proposal, no document evidencing sale or transfer of assets was executed between selling and purchasing companies. J. Morco, Inc. v. Prentiss Mfg. Co., 675 F. Supp. 1039, 1987 U.S. Dist. LEXIS 12465 (S.D. Miss. 1987).

The equitable holder of a chose in action, to whom a written assignment is not made, cannot sue in his own name. M. Lowenburg & Co. v. Jones, 56 Miss. 688, 1879 Miss. LEXIS 194 (Miss. 1879).

5. Suit by or in the name of assignor.

Court's order allowing insurers, which had made payments to the insured for loss under a contract subrogating them pro tanto to insured's claim for damages, to be made parties in insured's action for damages caused by the alleged negligent installation of gas heating appliance in no way interfered with insured's right to maintain action where none of the insurers filed pleadings attacking insurer's right, and only action taken by insurers' counsel was on the side of, and in aid of insured's cause and with his full consent and approval. Ford v. United Gas Corp., 254 F.2d 817, 1958 U.S. App. LEXIS 4113 (5th Cir. Miss.), cert. denied, 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64, 1958 U.S. LEXIS 443 (U.S. 1958).

Assignment of conditional sales contracts to a bank as collateral, held not to preclude the assignor from suing thereon. Murdock Acceptance Corp. v. Adcox, 245 Miss. 151, 138 So. 2d 890, 1962 Miss. LEXIS 542 (Miss. 1962).

Insurance companies, assignees of the insured's cause of action, by bringing the action in the name of the assignor for damages resulting from the defendant's alleged negligence in improperly installing a floor furnace in the insured's home, elected to proceed in the name of the assignor, so that the trial court properly refused to permit plaintiff's attorneys to impeach the assignor. Toler v. Owens, 231 Miss. 753, 97 So. 2d 728, 1957 Miss. LEXIS 562 (Miss. 1957).

Where suit by former sheriff against the county for fees alleged to be past due and owing him and the county made a counterclaim against the former sheriff and the suit was dismissed by agreement of the parties and without prejudice to either the claim of the former sheriff or the counterclaim of the county, and where later the former sheriff assigned his claim to an accountant, the order of dismissal was binding upon the former sheriff and nonprejudicial to the accountant's rights as assignee to thereafter prosecute a suit in his own name. Smith v. Copiah County, 219 Miss. 633, 69 So. 2d 404, 1954 Miss. LEXIS 371 (Miss. 1954).

Under this section [Code 1942, § 1448], court is correct in permitting action brought in name of wife on hospitalization policy to proceed in her name after reopening of case to permit husband, to whom she had made assignment, to state that he authorized her to bring suit in her name and waived all his rights under assignment. American Life Ins. Co. v. Walker, 208 Miss. 1, 43 So. 2d 657, 1949 Miss. LEXIS 401 (Miss. 1949).

Where surety company on fidelity bond paid credit association amount of loss occasioned by dishonesty of association's employee in forging indorsements on checks and drafts issued by such association on drawee-depository bank, and association assigned its rights to the surety, and at the request of the surety brought suit against the bank, suit could be instituted and prosecuted in the name of the association but the suit was entirely for the benefit of the surety. Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384, 1944 Miss. LEXIS 169 (Miss. 1944).

Where surety on fidelity bond paid credit association amount of loss occasioned by forgery of association's employee in the indorsement of checks and drafts issued by such association upon drawee bank, and association assigned its rights to surety, action in name of association against bank, to which bank set up equitable defenses, was properly removed to chancery court, and when so transferred, proof of all equities and the effect thereof could properly be made and considered. Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384, 1944 Miss. LEXIS 169 (Miss. 1944).

A liquidating committee of a bank, vested with authority under decree of the chancery court to sue for and collect the indebtednesses due such bank, could maintain an action to collect a debt due the bank represented by promissory notes collaterally secured by corporate stock notwithstanding that such notes and collateral security had been assigned by the bank to the Reconstruction Finance Corporation, in view of the fact that the bank, as payee of such promissory note, was the original party entitled to sue on the note within the meaning of this section [Code 1942, § 1448]. Morrison v. Gulf Oil Corp., 189 Miss. 212, 196 So. 247, 1940 Miss. LEXIS 108 (Miss. 1940).

Order to amend declaration in tort action by bringing in corporation, to which plaintiff assigned right of action before bringing suit, as party thereto, and dismissal of suit for noncompliance with such order, held erroneous. Solomon v. Continental Baking Co., 174 Miss. 890, 165 So. 607, 166 So. 376, 1936 Miss. LEXIS 215 (Miss. 1936).

Where the assignee brings suit in the name of the assignor, the suit may be prosecuted in the name of the assignor, or it can be by order of the court prosecuted in the name of the assignee as substituted plaintiff. Bolivar Compress Co. v. Mallett, 139 Miss. 213, 104 So. 79, 1925 Miss. LEXIS 134 (Miss. 1925).

Suits may be brought, maintained and appealed in the name of the assignor under this section [Code 1942, § 1448]. Ridgeway v. Jones, 122 Miss. 624, 84 So. 692, 1920 Miss. LEXIS 463 (Miss. 1920).

In a suit by one person for the use of another, recovery can only be had on the cause of action, the legal title to which is in the plaintiff. Where, under this section [Code 1942, § 1448] the usee is substituted for the plaintiff the extent to which the recovery may be had is not enlarged. Yazoo & M. V. R. Co. v. S. B. Wilson & Co., 83 Miss. 224, 35 So. 340, 1903 Miss. LEXIS 36 (Miss. 1903).

In actions of tort, usees have no rights that entitle them to recognition as parties litigant, but proof of right in the nominal plaintiff entitles him to a recovery. Jones v. Kansas C., M. & B. R. Co., 75 Miss. 913, 23 So. 547, 1898 Miss. LEXIS 33 (Miss. 1898).

A bailor whose warehouse receipts are pledged cannot maintain replevin or trover either in his own name or for the use of the pledgee. Selleck v. Macon Compress & Warehouse Co., 72 Miss. 1019, 17 So. 603, 1895 Miss. LEXIS 23 (Miss. 1895).

An action for damages against a railroad company for killing animals should not be brought in the name of one for the use of another, since in tort actions there cannot be a usee. Kansas City, M. & B. R. Co. v. Cantrell, 70 Miss. 329, 12 So. 344, 1892 Miss. LEXIS 123 (Miss. 1892).

A plaintiff suing on several demands, one of which is held by verbal assignment from a partnership, may amend so as to proceed in the name of the partnership, as to that, and dismiss as to the other claims. Shannon v. Rester, 69 Miss. 238, 13 So. 587, 1891 Miss. LEXIS 134 (Miss. 1891).

An assignor in writing of an account cannot sue in his own name for the use of the assignee. Beck v. Rosser, 68 Miss. 72, 8 So. 259, 1890 Miss. LEXIS 5 (Miss. 1890).

6. Right of assignee to sue.

In an action by a savings and loan association against a former vice-president and members of the board of directors for $26 million dollars in damages for alleged breach of fiduciary duty in the management of the association, the trial court properly rejected the defendants' contention that the suit was barred due to the acquisition of the association by a successor corporation where the written bill of sale and assignment had the effect of transferring and assigning unto the successor corporation all properties, assets and choses in action of every kind and nature, including the present action. Liberty Sav. & Loan Asso. v. Mitchell, 398 So. 2d 208, 1981 Miss. LEXIS 2003 (Miss. 1981).

A "subrogation receipt" taken by an insurer upon settling with insured for damage caused by a third person is such an assignment of insured's right of action as to permit the insurer to bring suit thereon. United States Fidelity & Guaranty Co. v. Covert, 242 Miss. 1, 133 So. 2d 403, 1961 Miss. LEXIS 522 (Miss. 1961).

Under this section [Code 1942, § 1448], public accountant has right to contract with public official for prosecution of suit for additional salary, in consideration of percentage of recovery, and the suit may be prosecuted in the name of the latter as assignee. Calhoun County v. Cooner, 152 Miss. 100, 118 So. 706, 1928 Miss. LEXIS 219 (Miss. 1928).

Liquidating agent authorized to effect settlement of debts, etc., by agreement between bank, creditors, and state banking department could sue on note payable to bank or bearer. Yazoo Delta Mortg. Co. v. Harlow, 150 Miss. 105, 116 So. 441, 1928 Miss. LEXIS 117 (Miss. 1928).

A contract for the sale of timber is enforceable against the vendor by the assignee of the vendee. Young v. Adams, 122 Miss. 1, 84 So. 1, 1920 Miss. LEXIS 412 (Miss. 1920).

Plaintiff must have title to a chose in action at the time he brings suit; so where assignment of the right of action on a fire insurance policy was not made to plaintiff until after he brought suit thereon, the action could not be maintained. St. Paul Fire & Marine Ins. Co. v. W. H. Daniel Auto Co., 121 Miss. 745, 83 So. 807, 1920 Miss. LEXIS 118 (Miss. 1920).

Where a carrier by mistake delivers partnership property to a stranger and pays the partnership for it, receiving an assignment from one only of the partners of his interest therein, it may sue the stranger for the value of the property, notwithstanding the failure of the other partners to join in the assignment. Johnson, Nesbitt & Co. v. Gulf & C. R. Co., 82 Miss. 452, 34 So. 357, 1903 Miss. LEXIS 169 (Miss. 1903).

And in such case the carrier may sue in trover or waive the tort and sue for the value of the property without an assignment from the owner. Johnson, Nesbitt & Co. v. Gulf & C. R. Co., 82 Miss. 452, 34 So. 357, 1903 Miss. LEXIS 169 (Miss. 1903).

The assignee may sue in his own name if the assignment be in writing, though another may possess a beneficial interest in the money due. Jenkins v. Sherman, 77 Miss. 884, 28 So. 726, 1900 Miss. LEXIS 55 (Miss. 1900).

This section [Code 1942, § 1448], gives to assignees of grantors in fee, and to the assignees of covenants expressed in conveyances in fee, the like remedies for the estate assigned and upon the conditions and covenants contained in them that the common law gave to the original parties and their privies in contract. Wright v. Hardy, 76 Miss. 524, 24 So. 697, 1898 Miss. LEXIS 96 (Miss. 1898).

Where the seller, by separate written contract, reserves the legal title as security for a note for the purchase price, the assignee of the note may enforce the contract as a security. Ross-Meehan Brake-Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 18 So. 364, 1895 Miss. LEXIS 37 (Miss. 1895).

But the right is purely defensive unless the assignment be in writing. Pollard v. Thomas, 61 Miss. 150, 1883 Miss. LEXIS 90 (Miss. 1883).

The person to whom a claim for damages for injury to personal property has been assigned in writing can sue thereon, in his own name. Chicago, S. L. & N. O. R. Co. v. Packwood, 59 Miss. 280, 1881 Miss. LEXIS 118 (Miss. 1881).

7. Assignment pendente lite.

In an action by an assignor in the circuit court, after transfer from the chancery court, for reimbursement for the default in the account of an insurance agent guaranteed by bond, the assignment having been made while the suit was pending in the chancery court, the assignee was entitled to prove the payment of the consideration for such assignment on the trial of the suit in the circuit court maintained in the name of the assignor. Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603, 1939 Miss. LEXIS 39 (Miss. 1939).

A plaintiff bringing a suit which is thereafter merged into other parties does not entitle defendant to a verdict in the case. Central Nat'l Bank v. Perry, 135 Miss. 445, 100 So. 276, 1924 Miss. LEXIS 62 (Miss. 1924).

It is no defense that the cause of action has been assigned since the beginning of the suit, and is still prosecuted in the name of the assignor. Montgomery v. Handy, 63 Miss. 43, 1885 Miss. LEXIS 9 (Miss. 1885).

8. Rights of assignor and assignee inter se.

A mortgage may be assigned but after the assignment the mortgagee has no authority to enter satisfaction thereon. Brown v. Yarbrough, 130 Miss. 715, 94 So. 887, 1922 Miss. LEXIS 246 (Miss. 1922).

The rights of the assignee cannot be affected by subsequent acts of the assignor. Peck-Hammond Co. v. Williams, 77 Miss. 824, 27 So. 995, 1900 Miss. LEXIS 41 (Miss. 1900).

9. Payment or settlement of claim after assignment.

A party is not protected in paying a claim which he knows has been assigned to another person unless he makes the payment to the person who owns it. Wells v. Edwards H. & C. R. Co., 96 Miss. 191, 50 So. 628, 1909 Miss. LEXIS 42 (Miss. 1909).

10. Evidence.

Where the nominal plaintiff assigns the cause of action pending the suit to the usee, evidence of an independent antecedent contract between the defendant and the usee is not admissible. Yazoo & M. V. R. Co. v. S. B. Wilson & Co., 83 Miss. 224, 35 So. 340, 1903 Miss. LEXIS 36 (Miss. 1903).

11. Parties.

Suit at law on chose in action must be brought in the name of legal owner, but in equity equitable owner may be joined. Cottrell v. Smith, 146 Miss. 837, 112 So. 465, 1927 Miss. LEXIS 251 (Miss. 1927).

The assignee of part of a claim is a necessary party to a suit for personal injuries to the assignor. A. K. McInnis Lumber Co. v. Rather, 111 Miss. 55, 71 So. 264, 1916 Miss. LEXIS 239 (Miss. 1916).

12. Limitation of actions.

Amendment to action by assignee to include assignor creates no new cause of action for consideration in determining limitations. Cottrell v. Smith, 146 Miss. 837, 112 So. 465, 1927 Miss. LEXIS 251 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Assignments §§ 98- 112.

2 Am. Jur. Pl & Pr Forms (Rev), Assignments, Forms 71-77 (Parties to actions; substitution).

2B Am. Jur. Legal Forms 2d, Assignments §§ 25:139 et seq. (choses in action; assignments arising out of contract); §§ 25:159 et seq. (choses in action; assignments arising out of tort).

CJS.

6A C.J.S., Assignments §§ 123-152.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties – Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March 1982.

1981 Mississippi Supreme Court Review; Insurance. 52 Miss. L. J. 445, June 1982.

§ 11-7-5. Assignee's action not prejudicial by set-off.

A setoff or other defense existing under Section 11-7-3 at the time of or before notice of the assignment shall not be prejudiced thereby.

HISTORY: Codes, 1857, ch. 61, art. 42; 1871, § 670; 1880, § 1507; 1892, § 660; 1906, § 717; Hemingway's 1917, § 496; 1930, § 506; 1942, § 1449.

Cross References — Limitation of setoff, see § 15-1-71.

Defenses available with assignment of negotiable instruments, see § 75-13-1.

JUDICIAL DECISIONS

1. In general.

Assignment of claim against county for purchase price of tractor sold was valid without consent of county, though there was element of guaranty or warranty. People's Bank of Weir v. Attala County, 156 Miss. 560, 126 So. 192, 1930 Miss. LEXIS 187 (Miss. 1930).

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. Graham v. Stewart, 152 Miss. 307, 120 So. 171, 1929 Miss. LEXIS 204 (Miss. 1929).

Assignee of account could not, after defendant in action thereon filed setoff, be substituted as plaintiff over objection. Graham v. Stewart, 152 Miss. 307, 120 So. 171, 1929 Miss. LEXIS 204 (Miss. 1929).

A judgment cannot be set off against another judgment so as to satisfy that part of it equitably assigned to the attorneys as compensation for their services in recovering it. Harris v. Hazlehurst Oil-Mill & Mfg. Co., 78 Miss. 603, 30 So. 273, 1900 Miss. LEXIS 183 (Miss. 1900).

And this is true, though the assignment of the account was not in writing. Ashby v. Carr, 40 Miss. 64, 1866 Miss. LEXIS 50 (Miss. 1866); Hunt & Vaughan v. Shackleford, 55 Miss. 94, 1877 Miss. LEXIS 110 (Miss. 1877).

In a suit by an indorsee of a note against the maker, the latter will be entitled to use a setoff on open account which was acquired by assignment before suit. Phipps v. Shegogg & Son, 30 Miss. 241, 1855 Miss. LEXIS 92 (Miss. 1855).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Assignments § 108.

§ 11-7-7. Transfer of chose in action after filing.

Any chose in action or any interest therein, after suit has been filed thereon, may be sold or assigned the same as other property, whether such claim or any interest therein was heretofore assignable under the laws of this state or not. Such sale shall be evidenced by writing signed and acknowledged by the party making the same, which shall be filed with the papers of such suit. After such filing, it shall be the duty of the clerk, in whose office such papers are kept, to make a minute of such sale or transfer on the trial docket where the suit is entered, giving briefly the substance thereof, for which he shall be entitled to a fee of Twenty-five Cents (25¢), to be paid by the party applying therefor. Such transfer when so made and dealt with shall be valid and binding upon all persons thereafter dealing with such claim, whether they have actual notice thereof or not.

HISTORY: Codes, 1906, § 718; Hemingway's 1917, § 498; 1930, § 507; 1942, § 1450; Laws, 1902, ch. 69; Laws, 1991, ch. 573, § 19, eff from and after July 1, 1991.

Cross References — Executions and attachments on choses in action, see §§ 13-3-127, 13-3-133, 13-3-135, 13-3-147.

Assignments generally, see § 75-13-1.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Bad faith claim against insurance company.

1. In general.

Liability for corporate debt was limited to those officers and directors who were actively involved in the control and management of the corporation, and the president's testimony at trial made it clear he was involved in the control and management of the corporation; however, where there was no proof of any assignment to the president by the corporation of any chose in action as contemplated under Miss. Code Ann. § 11-7-7, the president had no standing to pursue the action on behalf of the corporation. Consequently, although the president, individually, could have been held liable for the corporate torts committed by the corporation, he had no authority to sue on a contract that belonged to the corporation; accordingly, all claims brought by the corporation and the president were dismissed. 4 H Constr. Corp. v. Superior Boat Works, Inc., 659 F. Supp. 2d 774, 2009 U.S. Dist. LEXIS 83183 (N.D. Miss. 2009), aff'd, 579 Fed. Appx. 278, 2014 U.S. App. LEXIS 16558 (5th Cir. Miss. 2014).

When a bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits; as such, it became the owner of the lawsuits, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 2006 Miss. LEXIS 409 (Miss. 2006).

Trial court's denial of a church's motion to quash a writ of execution upon its chose of action against a third party was affirmed, as nothing in Miss. Code Ann. § 11-7-7 excluded writs of execution from the manner in which a chose in action could be transferred. Maranatha Faith Ctr., Inc. v. Colonial Trust Co., 904 So. 2d 1004, 2004 Miss. LEXIS 1405 (Miss. 2004).

Miss. Code Ann. § 11-7-7 does not prohibit a chose in action from being subject to a writ of execution. Maranatha Faith

Ctr., Inc. v. Colonial Trust Co., 904 So. 2d 1004, 2004 Miss. LEXIS 1405 (Miss. 2004).

The right to sue for trespass to property was assignable to a subsequent purchaser of property, such that the grantee had the same rights as the prior owner; absent some other doctrine, buyers could bring suit for the claim originally possessed by the railroad. Flowers v. McCraw, 792 So. 2d 339, 2001 Miss. App. LEXIS 325 (Miss. Ct. App. 2001).

Attorney who, under oral contract for contingent fee, prosecuted suit for unliquidated damages to judgment and received from client, filed in the cause, an assignment in writing of that interest in the judgment, had a superior interest in judgment and took precedence to judgment debtor's claim of right of setoff, although at the time suit was commenced and when judgment was rendered, attorney's client was indebted to defendant in such suit in a larger sum than his judgment. Stribling Motor Co. v. Smith, 195 Miss. 547, 15 So. 2d 364, 1943 Miss. LEXIS 149 (Miss. 1943).

This section [Code 1942, § 1450], requiring that assignment of chose in action be in writing, filed with papers, held not in conflict with Code 1942, § 1448, authorizing institution or continuance of action in assignor's name or substitution of assignee as plaintiff on his application. Solomon v. Continental Baking Co., 174 Miss. 890, 165 So. 607, 166 So. 376, 1936 Miss. LEXIS 215 (Miss. 1936).

Landowner's right to recover for cutting timber is assignable; deed conveying land with all rights of action accrued or to accrue, for depredation and trespasses, assigned right of action for wrongful cutting timber prior thereto. J. H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593, 1928 Miss. LEXIS 127 (Miss. 1928).

Satisfaction of judgment for damage to contents of building is bar to other action by same person for damage to buildings from same negligent act, though plaintiff had assigned his interest in second action, where notice of assignment was not given or filed as required by this section [Code 1942, § 1450]. Fewell v. New Orleans & N. E. R. Co., 144 Miss. 319, 109 So. 853, 1926 Miss. LEXIS 364 (Miss. 1926).

This statute [Code 1942, § 1450] does not apply to the assignment of a judgment but applies to assignment before judgment. Pigford Grocery Co. v. Wilder, 116 Miss. 233, 76 So. 745, 1917 Miss. LEXIS 287 (Miss. 1917).

2. Bad faith claim against insurance company.

A claim against an insurance company for bad faith is assignable. Kaplan v. Harco Nat'l Ins. Co., 708 So. 2d 89 (Miss. Ct. App.), op. withdrawn, 716 So. 2d 673, 1998 Miss. App. LEXIS 139 (Miss. Ct. App. 1998).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Assignments §§ 66- 68.

2 Am. Jur. Pl & Pr Forms (Rev), Assignments, Forms 71-77 (Parties to actions; substitution).

CJS.

6A C.J.S., Assignments §§ 123-152.

§ 11-7-9. Action for seduction of a woman.

An unmarried female may prosecute an action for her own seduction, and recover damages.

HISTORY: Codes, 1880, § 1508; 1892, § 661; 1906, § 719; Hemingway's 1917, § 499; 1930, § 508; 1942, § 1451.

Cross References — Crime of seduction, see § 97-29-55.

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur., Seduction § 80.
70 Am. Jur. 2d, Seduction § 33.

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

§ 11-7-11. Action for seduction of a child.

A parent may bring an action for the seduction of a child, although such child be not living with nor in the service of the plaintiff, and though there be no loss of service; but a recovery by the parent or child shall bar any other action for the same cause.

HISTORY: Codes, 1880, § 1509; 1892, § 662; 1906, § 720; Hemingway's 1917, § 500; 1930, § 509; 1942, § 1452; Laws, 1988, ch. 413, eff from and after passage (approved April 23, 1988).

Cross References — Crime of seduction, see § 97-29-55.

JUDICIAL DECISIONS

1. In general.

Father was entitled to damages for humiliation and wounded feelings caused by seduction of daughter. Stone v. Bang, 153 Miss. 892, 122 So. 95, 1929 Miss. LEXIS 97 (Miss. 1929).

Defendant was guilty of seduction, if female between twelve and eighteen consented to sexual intercourse as result of defendant's promise to give her money, clothes, etc. Stone v. Bang, 153 Miss. 892, 122 So. 95, 1929 Miss. LEXIS 97 (Miss. 1929).

RESEARCH REFERENCES

Am. Jur.
59 Am. Jur. 2d, Parent and Child §§ 115 et seq.
70 Am. Jur. 2d, Seduction §§ 33, 34, 36.
22 Am. Jur. Pl & Pr Forms (Rev), Seduction, Forms 3-6 (Complaint, petition, or declaration for seduction in action by father or mother).

§ 11-7-12. Civil penalty recoverable for violation of bad check statute; applicability to electronic transfers of funds.

(1) If a check, draft or order is made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the payee, endorser or his assignee shall be entitled to collect, in addition to the face amount of the check, draft or order, a service charge of Forty Dollars ($40.00).

(2) In any civil action founded on a check, draft or order made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the plaintiff, if he be a payee, endorser, holder or assignee, shall be entitled to recover, in addition to the face amount of the check, draft or order, damages in the following amount:

(a) If the amount of the check, draft or order is up to and including Twenty-five Dollars ($25.00), then the additional damages shall be:

(i) A service charge of Thirty Dollars ($30.00); and

(ii) In the event suit is filed by a licensed attorney, reasonable attorney's fees as determined by the judge.

(b) If the amount of the check, draft or order is above Twenty-five Dollars, then the additional damages shall be:

(i) A service charge of Forty Dollars ($40.00); and

(ii) In the event suit is filed by a licensed attorney, reasonable attorney's fees as determined by the judge.

(c) The payee, endorser, holder or assignee of a check, draft or order may claim in a single civil action all checks, drafts or orders made, drawn, issued, uttered or delivered in violation of Section 97-19-55 by a single drawer without regard to venue or the identity or number of payees on those instruments.

(d) The provisions of this section shall also apply to electronic transfers of funds.

HISTORY: Laws, 1976, ch. 454; Laws, 2000, ch. 364, § 1; Laws, 2004, ch. 374, § 2; Laws, 2007, ch. 451, § 1, eff from and after July 1, 2007.

Cross References — Duty to establish accounts to facilitate handling of bad checks paid into the state treasury, see § 7-9-12.

Bad checks generally, see § 97-19-55 et seq.

JUDICIAL DECISIONS

1. Fraudulent intent requirement.

In wife's contempt action against former husband, the wife presented no evidence that the husband issued the checks for child support, which the wife did not present to the bank for months, with fraudulent intent; therefore, there was no justification for the chancellor to award any statutory damages under Miss. Code Ann. § 11-7-12 regarding the checks that were returned for insufficient funds, and for which the husband's efforts to make good on the amounts were rebuffed by the wife. Broome v. Broome, 832 So. 2d 1247, 2002 Miss. App. LEXIS 858 (Miss. Ct. App. 2002).

OPINIONS OF THE ATTORNEY GENERAL

A tax collector, or a tax assessor and tax collector, may use the provisions of the statute to collect a bad check and obtain a civil penalty therefor. Ross, May 15, 1998, A.G. Op. #98-0261.

RESEARCH REFERENCES

ALR.

Constitutionality of "bad check" statute. 16 A.L.R.4th 631.

§ 11-7-13. Actions for injuries producing death.

Whenever the death of any person or of any unborn quick child shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person or of any unborn quick child shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or interested party may bring an action pursuant to the provisions of this section outside an estate, regardless of whether there are real or personal assets of an estate. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full-blood and had been born to the adopting parents in lawful wedlock.

The list of persons in this section who may bring a wrongful death action is exclusive and only those persons shall be considered interested parties who are entitled to bring an action under this section.

A defendant in an action under this section is authorized within ninety (90) days of filing an answer, to request that the plaintiff initiate the process of determining heirs. Such determination must be resolved before commencement of trial.

HISTORY: Codes, 1857, ch. 61, art. 48; 1871, § 676; 1880, § 1510; 1892, § 663; 1906, § 721; Hemingway's 1917, § 501; 1930, § 510; 1942, § 1453; Laws, 1908, ch. 167; Laws, 1922, ch. 229; Laws, 1952, ch. 248; Laws, 1958, ch. 285, § 1; Laws, 1977, ch. 435; Laws, 1981, ch. 529, § 6; Laws, 1993, ch. 302, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 11; Laws, 2004, ch. 515, § 1; Laws, 2013, ch. 548, § 1, eff from and after passage (approved Apr. 25, 2013); Laws, 2018, ch. 340, § 1, eff from and after July 1, 2018.

Editor's Notes — Laws of 1958, ch. 285, § 3, provides as follows:

"SECTION 3. This Act shall apply where the death occurs on or after the passage of this Act; it shall be immaterial that the rights conferred herein did not exist at the time of the adoption or were not conferred by the decree of adoption; and the adopting parent or adopting parents shall have and possess the rights and powers which have been added by this Act, automatically by the operation of law."

Laws of 1981, ch. 529, § 7, provides as follows:

"SECTION 7. Nothing in Section 6 of this act shall be construed as conferring any additional rights or remedies upon illegitimates in wrongful death actions concerning the death of a decedent which occurred prior to July 1, 1981."

Laws of 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

Amendment Notes — The 2018 amendment added the second sentence of the fourth paragraph.

Cross References — Constitutional authority for actions for death of employees, see Miss. Const. Art. 7, §§ 191, 193.

Liability of ships and vessels for wrongful death, see § 11-7-175.

Presumption of negligence in case of injury by railroads and motor vehicles, see § 13-1-123.

Limitation of action by personal representative of decedent, see § 15-1-55.

Exemption of damages for wrongful death from collection by hospital reimbursement commission, see § 41-7-95.

Period of retention of hospital records in case of wrongful death, see § 41-9-69.

Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

Liability of railroads for negligence and mismanagement, see § 77-9-435 et seq.

Exemption of judgment from execution for debt, see §§ 85-3-17, 85-3-19.

Effect of final decree of adoption, see § 93-17-13.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Relation to Other Laws.
3. Right of action generally.
4. —Marital misconduct, as affected by.
5. —Enforcement of foreign cause of action.
6. Persons entitled to sue.
7. Persons entitled to recover.
8. Proximate cause.
9. Negligence and contributory negligence.
10. Limitation of actions.
11. Actions in general.
12. —Joinder of actions.
13. —Removal of cause.
14. Pleading.

15. Issues, proof and variance.
16. Parties.
17. Evidence.
18. Questions for jury.
19. Instructions.
20. Execution on judgment.
21. Attorney fees.
22. Damages.
23. —Elements of damages.
24. —Measure of damages.
25. —Amount of damages.
26. —Exemplary or punitive damages.
27. Compromise, settlement and release.
28. Res judicata.
29. Unborn child.
30. Adopted child.
31. Jurisdiction.
32. Collateral source rule.

1. In general.

In a wrongful death action under Miss. Code Ann. § 11-7-13, a motion to compel arbitration should have been granted because an arbitration agreement between a doctor and a patient agreement fell under 9 USCS § 2 since it had a nexus to interstate commerce, and there was no procedural unconscionability based on the patient's inability to read since the language was not complex, the waiver of the right to a trial was in bold and capital letters, the patient signed or initialed on several pages, and there was a time lapse between the signing and the date of a surgery. Cleveland v. Mann, 942 So. 2d 108, 2006 Miss. LEXIS 467 (Miss. 2006).

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies while in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2003). Lee v. Thompson, 859 So. 2d 981, 2003 Miss. LEXIS 407 (Miss. 2003).

Wrongful death statute should be given reading most coherent in principle, given entire statutory scheme and other valid rules in field. Fizer v. Davis (In re Estate of Davis), 706 So. 2d 244, 1998 Miss. LEXIS 16 (Miss. 1998).

Wrongful death statute creates new and independent cause of action, unknown to common law, in favor of those named therein. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

In wrongful death action, there is no injury, and hence, no cause of action, until death occurs. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

Venue in wrongful death action alleging medical malpractice was proper either in county in which patient died some six months after allegedly negligent care was rendered, or in county in which that care was rendered. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

Wrongful death statute is strictly construed on appellate review. Pannell v. Guess, 671 So. 2d 1310, 1996 Miss. LEXIS 124 (Miss. 1996).

No statute provides for prejudgment interest on estimated earnings from time of decedent's death to time of trial, consequently, trial judge would have been correct in denying prejudgment interest on this basis alone, including § 11-7-13. Smith v. Industrial Constructors, Inc., 783 F.2d 1249, 1986 U.S. App. LEXIS 22729 (5th Cir. Miss. 1986).

On a factual showing that landowner neither did nor failed to do anything that breached any duty owed to the invitee, landowner was properly granted a directed verdict in action for the wrongful death of an experienced woodcutter whom he had hired to come onto his premises to fell trees and cut up firewood, and who was fatally injured in the felling of the first tree. Hathorn v. Hailey, 487 So. 2d 1342, 1986 Miss. LEXIS 2454 (Miss. 1986).

Code 1972, § 11-7-13 must be considered in pari materia with Code 1972, §§ 91-7-231, 91-7-233, which authorize only a personal representative to sue to recover the assets of the deceased. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

Since the wrongful death statute created a cause of action unknown to the common law, it must be strictly construed. Smith v. Garrett, 287 So. 2d 258, 1973 Miss. LEXIS 1328 (Miss. 1973).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of his father where the father has not acknowledged the child did not deny equal protection of the laws to an illegitimate son who had not been acknowledged by the deceased. Sanders v. Tillman, 245 So. 2d 198, 1971 Miss. LEXIS 1362 (Miss. 1971).

Where a prime contractor, after the subcontractor failed to furnish a performance bond, terminated the subcontract and thereafter directed the subcontract work in all particulars, a workman who was killed when struck by a vehicle engaged in performance of the subcontract was an employee of the prime contractor, and the prime contractor was precluded from the recovery of indemnification from the subcontractor for the amount of a settlement in a wrongful death action. C. H. Leavell & Co. v. Doster, 233 So. 2d 775, 1970 Miss. LEXIS 1668 (Miss. 1970).

The wrongful death statute creates an entirely new cause of action for the benefit of the persons named in the act, and the cause of action is not a part of the estate of the decedent. Harvey v. State, 218 So. 2d 11, 1969 Miss. LEXIS 1586 (Miss. 1969).

State law, rather than Death on the High Seas Act, governs the remedies for wrongful deaths occurring on artificial islands and fixed structures erected thereon on the outer Continental Shelf. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360, 1969 U.S. LEXIS 3100 (U.S. 1969), but see Herb's Welding v. Gray, 703 F.2d 176, 1983 U.S. App. LEXIS 28741 (5th Cir. 1983).

An action for wrongful death is not derivative. Triplett v. United States, 213 F. Supp. 887, 1963 U.S. Dist. LEXIS 7940 (S.D. Miss. 1963).

Since an action under the wrongful death statute against a motorist for the death of a four and a half year old child was not an action by the child's estate, but was one brought by the administrator on behalf of the surviving heirs named in the statute, the estate of the decedent could not be adversely, beneficially, or otherwise affected thereby, and the motorist was not disqualified as a witness by the dead man's statute. Hawkins v. Rye, 233 Miss. 132, 101 So. 2d 516, 1958 Miss. LEXIS 365 (Miss. 1958).

Since this section [Code 1942, § 1453] created an action unknown to the common law, the court was not justified in extending its application beyond its terms. Logan v. Durham, 231 Miss. 232, 95 So. 2d 227, 1957 Miss. LEXIS 509 (Miss. 1957).

Where an amendment to the statute provided that if employer fails to secure the payment of workmen's compensation, the employee or the legal representative has the choice between claiming compensation or suing at law for damages, and in such event neither negligence of fellow servant, assumption of risk, nor contributory negligence can be pleaded, this amendment did not repeal the Workmen's Compensation Law and reinstate the right to maintain an action for wrongful death of an employee as in existence prior to the original enactment of the statute. Allen v. R. G. Le Tourneau, Inc., 220 Miss. 520, 71 So. 2d 447, 1954 Miss. LEXIS 465 (Miss. 1954).

This section [Code 1942, § 1453] is in derogation of the common law and as such must be strictly construed. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944); Boroughs v. Oliver, 217 Miss. 280, 64 So. 2d 338, 1953 Miss. LEXIS 430 (Miss. 1953).

The statute is not one of survival but creates a new and independent cause of action. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944); Hawkins v. Rye, 233 Miss. 132, 101 So. 2d 516, 1958 Miss. LEXIS 365 (Miss. 1958).

The statute does not cause the deceased's right of action to survive or be revived, but creates an independent cause of action. Thames v. Mississippi, 117 F.2d 949, 1941 U.S. App. LEXIS 4382 (5th Cir. Miss.), cert. denied, 314 U.S. 630, 62 S. Ct. 63, 86 L. Ed. 506, 1941 U.S. LEXIS 394 (U.S. 1941).

The history of this section [Code 1942, § 1453] is discussed in Illinois C. R. Co. v.

Fuller, 106 Miss. 65, 63 So. 265, 1913 Miss. LEXIS 97 (Miss. 1913).

2. Relation to Other Laws.

Mississippi law, rather than South Carolina law, governed the distribution of settlement funds in a wrongful-death action when a South Carolina resident was killed in a motor-vehicle accident in Mississippi because the personal representative of the decedent's estate waived the choice-of-law issue by not bringing the issue to the Mississippi trial court's attention early in the proceedings. Shortie v. George, 233 So. 3d 883, 2017 Miss. App. LEXIS 299 (Miss. Ct. App. 2017).

A statutory heir under the descent and distribution statutes (Miss. Code Ann. §§ 91-1-1 to 91-1-11) is not necessarily a listed relative under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13, since the listed relatives under the wrongful death statute exclude a decedent's grandparents, uncles and aunts, each of whom are included in the descent and distribution statute's definition of "statutory heir." Burley v. Douglas, 26 So. 3d 1013, 2009 Miss. LEXIS 538 (Miss. 2009).

3. Right of action generally.

Since beneficiaries could have only brought claims the decedent could have brought had the decedent survived, logic required the Mississippi Supreme Court to conclude that the converse was true, in that the decedents could not have brought claims the decedent could not have brought, had the decedent survived; therefore, where a patient signed an arbitration agreement with a doctor prior to surgery, beneficiaries were not able to subsequently file a wrongful death action against the doctor arising out of such surgery. Cleveland v. Mann, 942 So. 2d 108, 2006 Miss. LEXIS 467 (Miss. 2006).

Miss. Code Ann. § 11-7-13 did not recognize "contingent" wrongful death claims as to do so would usurp the child's right to damages to which she would be entitled simply because her relatives anticipated her death earlier than it would naturally occur; therefore, there was no claim upon which relief could be granted, and the trial court was correct to grant a dismissal. In re Brantley v. Brantley, 865 So. 2d 1126, 2004 Miss. LEXIS 184 (Miss. 2004).

While Miss. Code Ann. § 11-7-13 (Supp. 2003) allows wrongful death beneficiaries to maintain an action to recover damages as would the decedent if death had not ensued, the action is derivative and the beneficiaries stand in the position of their decedent; thus, where the decedent was a prison inmate who could not have filed an action against the Mississippi Department of Corrections or a prison superintendent because of the immunity granted in Miss. Code Ann. § 11-46-9(1)(m), his wrongful death beneficiaries could not maintain a wrongful death action against those defendants. Carter v. Miss. Dep't of Corr., 860 So. 2d 1187, 2003 Miss. LEXIS 655 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392 (U.S. 2004).

Heirs of deceased smoker could not recover damages for injuries suffered by smoker during his lifetime in wrongful death action where jury found that cause of death was unrelated to smoker's lung cancer or chronic obstructive pulmonary disease, but rather was pulmonary embolism caused by complications resulting from treatment for gonorrhea in 1940's, and heirs did not also assert claim under survival statute. Wilks v. American Tobacco Co., 680 So. 2d 839, 1996 Miss. LEXIS 493 (Miss. 1996).

Wrongful death action is not part of estate of deceased, and only those individuals listed in wrongful death statute may bring this independent, statutory cause of action. Pannell v. Guess, 671 So. 2d 1310, 1996 Miss. LEXIS 124 (Miss. 1996).

Family members of motorist who was left in coma as result of automobile accident did not have claim under Mississippi law for "loss of filial consortium" similar to wrongful death claim, even though loss they suffered was arguably similar; rather, claim remained one in nature of personal injury, despite severity of injury, as claim by motorist survived through conservator. Moore v. Kroger Co., 800 F. Supp. 429, 1992 U.S. Dist. LEXIS 12526 (N.D. Miss. 1992), aff'd, 18 F.3d 936, 1994 U.S. App. LEXIS 5268 (5th Cir. Miss. 1994).

Mother of decedent was not entitled to bring wrongful death action where decedent was killed when he was struck by car while working on highway project; contention that wrongful death statute controlled over Workers' Compensation provision which provided that it would be exclusive remedy; also rejected was argument that because mother was not dependent on decedent exclusive remedy provision in death benefit cases did not apply was also rejected, because act intended to provide exclusive remedy growing out of employer-employee relationship, and different result would subject employer in many instances to double liability. Estate of Morris v. W. E. Blain & Sons, Inc., 511 So. 2d 945, 1987 Miss. LEXIS 2698 (Miss. 1987).

Wrongful death action may be maintained when unborn child dies after reaching pre-natal age of viability, when destruction of life of its mother does not necessarily mean end of its life also, and when, if separated from its mother, it would be so far matured as human being that it would live and grow mentally and physically as person; if such child dies before birth as result of negligent act of another, action may be maintained under wrongful death statute. Terrell v. Rankin, 511 So. 2d 126, 1987 Miss. LEXIS 2616 (Miss. 1987).

Dismissal of personal injury claims brought by particular plaintiff does not collaterally estop wrongful death action asserted on behalf of family members by plaintiff in representative capacity since party appearing in representative capacity for others is not bound by determination of earlier suit in which he appeared only in individual capacity. Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, 1985 U.S. App. LEXIS 23252 (5th Cir. Miss. 1985).

Where the husband of a deceased woman, he being the sole party in interest under § 11-7-13, sued and recovered judgment in a court of competent jurisdiction for all damages resulting from his wife's death against all of the parties jointly and severally liable, and the judgment was paid in full, the cause of action against all parties who were jointly and severally liable for the woman's death was thereby terminated; accordingly, a subsequent suit by the deceased's sister, individually and as representative of the heirs and as administratrix of the deceased's estate, was properly dismissed with prejudice. Campbell v. C & H Transp. Co., 411 So. 2d 1284, 1982 Miss. LEXIS 1911 (Miss. 1982).

In an action to recover for the wrongful death of a boy who was injured after climbing into a newly installed septic tank that had been opened to facilitate an inspection, defendants were entitled to a peremptory instruction relieving them of liability, since the duty owed to the boy as a trespasser or at most as a licensee, was to refrain from willfully or wantonly injuring him; nor was the doctrine of attractive nuisance applicable under these facts since the septic tank was not an inherently dangerous instrumentality. Hughes v. Star Homes, Inc., 379 So. 2d 301, 1980 Miss. LEXIS 1841 (Miss. 1980), overruled in part, Johnson v. Goodson, 267 So. 3d 774, 2019 Miss. LEXIS 159 (Miss. 2019).

This section did not authorize a wrongful death claim, based on a warranty theory of liability, against the manufacturer and original seller of the aircraft in which decedent was killed. McCullough v. Beech Aircraft Corp., 587 F.2d 754, 1979 U.S. App. LEXIS 17646 (5th Cir. Miss. 1979).

In a wrongful death action based in part upon the failure of an aircraft seat and harness upon a crash, such failure was regarded as a separate or "second accident" where the alleged defect did not cause or contribute to the initial mishap and did not arise from the intended normal use for which the product was manufactured. Williams v. Cessna Aircraft Corp., 376 F. Supp. 603, 1974 U.S. Dist. LEXIS 8854 (N.D. Miss. 1974).

An action is not maintainable for the wrongful death of one whose right against defendant is limited to the recovery of workmen's compensation. Evans v. Avery, 272 Ala. 230, 130 So. 2d 373, 1961 Ala. LEXIS 426 (Ala. 1961).

A municipality may be held liable under this statute [Code 1942, § 1453]. City of Corinth v. Gilmore, 236 Miss. 296, 110 So. 2d 606, 1959 Miss. LEXIS 319 (Miss. 1959).

Where a nonresident and a resident were killed in an automobile collision in Mississippi allegedly as the result of the nonresident's negligence, the heirs of the deceased resident had a cause of action against the personal representative of the deceased nonresident under this section [Code 1942, § 1453], and were creditors of the nonresident's estate, and upon their petition the chancery court of the county where the nonresident's death occurred had jurisdiction to grant administration upon the estate of the nonresident. Day v. Hart, 232 Miss. 516, 99 So. 2d 656, 1958 Miss. LEXIS 301 (Miss. 1958).

Where a wife died of injuries sustained in an automobile accident allegedly due to the negligence of her husband, an action was not maintainable against the husband by or on behalf of the deceased's mother and father and sisters, the remoter class of beneficiaries under this section [Code 1942, § 1453], merely because the preferred beneficiaries, the husband, as tortfeasor, or the unemancipated minor child of the husband and wife, could not maintain the action. Logan v. Durham, 231 Miss. 232, 95 So. 2d 227, 1957 Miss. LEXIS 509 (Miss. 1957).

Under this section [Code 1942, § 1453] it is essential to the maintenance of an action for death by wrongful act that the wrongful act be of such character as would have supported an action by the deceased for his injuries if he had survived. Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434, 1954 Miss. LEXIS 537 (Miss. 1954).

This section [Code 1942, § 1453] is an adaption of Lord Campbell's Act, which in derogation of the common law gave a cause of action to the executor or administrator of a person whose death had been caused by defendants' wrongful act, neglect, or default, and extends this right of action to the widow or other appropriate heirs of the deceased when the death has been "caused by any real wrongful or negligent act, or omission, or by [any] unsafe machinery, way or appliances" in cases where the injured party, had he survived, could have maintained an action in respect thereof. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

While the right of a decedent to maintain an action, if he had survived, is a prerequisite to the right of his widow to maintain an action for his death, the initial requirement remains that death must have been caused by a real wrongful or negligent act. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

While the early refinements in the construction of this section [Code 1942, § 1453] were concerned with the definitive scope of "negligence," involving the propriety of including deliberate or felonious acts, the employment of the term "wrongful" expanded its meaning to include felonious acts, but nowhere in the materials from which this statutory reform was constructed is there found any reference to acts that were wrongful except in the tortious sense. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

The employment of the words "real wrongful" in this section [Code 1942, § 1453] narrows its meaning to an actual and not a nominal or constructive wrong. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

This section [Code 1942, § 1453] does not create a right of action ex contractu by a widow for the death of her husband. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

A widow does not, under this section [Code 1942, § 1453], have a right of action for the death of her husband, caused by eating pie infected with a poisonous substance, grounded upon breach of implied warranty, since the statute applies only to death caused by a wrongful or negligent act. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791, 1944 Miss. LEXIS 214 (Miss. 1944).

Code of 1892 § 663, as amended by Laws 1898 ch. 65 (Code 1906, § 721) and incorporated above, relates to causes of action antedating the constitution, of liability under the general law of negligence, and in no way to causes of action for injuries inflicted by fellow servants. Hence, it was not repealed or affected by Laws 1898, ch. 66 (since declared unconstitutional in Ballard v. Mississippi Cotton Oil Co. 81 M 507, 34 So 533). Const.

§ 193, and (Code 1892, § 4056) as amended by Acts 1898 ch. 66, relate exclusively to actions by employees to recover for injuries due to negligence of those fellow servants named therein. Bussey v. Gulf & S. I. R. Co., 79 Miss. 597, 31 So. 212, 1901 Miss. LEXIS 108 (Miss. 1901).

By the express terms of Laws 1898 ch. 65, incorporated above, it applies to all personal injuries of employees, resulting in death, due to the negligence of the master. Bussey v. Gulf & S. I. R. Co., 79 Miss. 597, 31 So. 212, 1901 Miss. LEXIS 108 (Miss. 1901).

The right of a parent under this section (Code 1906, § 721) depends on whether the child, had it survived, could have maintained an action for the injury. White v. Louisville, N. O. & T. R. Co., 72 Miss. 12, 16 So. 248, 1894 Miss. LEXIS 73 (Miss. 1894).

The right of action is independent of that given to the executor and administrator. Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537, 1887 Miss. LEXIS 92 (Miss. 1887).

4. —Marital misconduct, as affected by.

The wife's conduct will not prevent recovery for the death of her husband. Belzoni Hardwood Lumber Co. v. Langford, 127 Miss. 234, 89 So. 919, 1921 Miss. LEXIS 217 (Miss. 1921).

5. —Enforcement of foreign cause of action.

Under this section [Code 1942, § 1453] a minor whose mother was appointed a tutrix for purpose of bringing action under the Louisiana workmen's compensation law could sue in federal district court for Mississippi district by mother as next friend, to recover damages for father's death, and Louisiana court's leave was not required inasmuch as the law of Mississippi was governing. C. J. Peck Oil Co. v. Diamond, 204 F.2d 179, 1953 U.S. App. LEXIS 2412 (5th Cir. Miss. 1953).

Where wrongful death caused in Louisiana, an administrator cannot maintain suit therefor in Mississippi because no right of action is given the administrator in Louisiana. Vicksburg, S. & P. R. Co. v. Williams, 102 Miss. 735, 59 So. 883, 1912 Miss. LEXIS 113 (Miss. 1912).

Where an injury occurs in Louisiana the rights of the parties will be determined by the Louisiana statutes. Runt v. Illinois C. R. Co., 88 Miss. 575, 41 So. 1, 1906 Miss. LEXIS 157 (Miss. 1906).

Where the injury resulting in death occurs in another state having a statute substantially corresponding to ours the remedy may be enforced here. Chicag, S. L. & N. O. R. Co. v. Doyle, 60 Miss. 977, 1883 Miss. LEXIS 50 (Miss. 1883).

6. Persons entitled to sue.

Statute does create tiered categories of wrongful-death beneficiaries, but only as to the right to recover damages, not the right to file the wrongful-death action. Trk v. Myles, 214 So. 3d 191, 2017 Miss. LEXIS 77 (Miss. 2017).

Circuit court did not err by granting the motion of a decedent's child to be substituted as the plaintiff in the wrongful-death action the decedent's mother filed and by denying companies' motion to dismiss for lack of standing because the mother had standing when she filed her wrongful-death suit; an order of priority existed as to who could recover damages but not as to standing. Trk v. Myles, 214 So. 3d 191, 2017 Miss. LEXIS 77 (Miss. 2017).

Statute does create tiered categories of wrongful-death beneficiaries, but only as to the right to recover damages, not the right to file the wrongful-death action. Trk v. Myles, 214 So. 3d 191, 2017 Miss. LEXIS 77 (Miss. 2017).

Circuit court did not err by granting the motion of a decedent's child to be substituted as the plaintiff in the wrongful-death action the decedent's mother filed and by denying companies' motion to dismiss for lack of standing because the mother had standing when she filed her wrongful-death suit; an order of priority existed as to who could recover damages but not as to standing. Trk v. Myles, 214 So. 3d 191, 2017 Miss. LEXIS 77 (Miss. 2017).

An "interested party" is a person who has a relationship to the decedent that is recognized by law and who therefore has suffered a remediable injury (i.e., the invasion of a legally protected interest) by the wrongful deprivation of the decedent's life at the defendant's hands. Such a person thus may claim a genuine right of recovery from the decedent's wrongful death action by seeking damages for his or her injury, and that right gives the claimant a legally sufficient interest in the action to make him or her an interested party under the wrongful death statute. Clark Sand Co. v. Kelly, 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

In a wrongful death action, the trial court erred, when considering defendant's summary judgment motion, in finding that plaintiff was not the decedent's common law wife because the trial court was not permitted to make such a factual determination at the summary judgment stage. Clark Sand Co. v. Kelly, 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, the girlfriend did not have standing as an interested party because, at the time she commenced the suit, she did not have a recognized-by-law relationship to the deceased. Her later appointment as executrix did not change that. Clark Sand Co. v. Kelly, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), op. withdrawn, sub. op., 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, since, at the time she filed the suit, the girlfriend had not yet been formally appointed executrix of the deceased's estate, she did not have standing as his personal representative to bring the present action at that time. The personal representative also lacked standing as the deceased's executrix under the savings statute. Clark Sand Co. v. Kelly, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), op. withdrawn, sub. op., 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

Under Miss. Code Ann. § 11-7-13, an "interested party" may not only join a wrongful death action, but may also initiate such an action. Burley v. Douglas, 26 So. 3d 1013, 2009 Miss. LEXIS 538 (Miss. 2009).

Pursuant to Miss. Code Ann. § 11-7-13, although a grandfather did not qualify as a personal representative or a listed relative under the statute, he was an interested party under the statute because of his relationship as an inheriting heir of the deceased grandchildren, and therefore had standing to bring a wrongful death action. Burley v. Douglas, 26 So. 3d 1013, 2009 Miss. LEXIS 538 (Miss. 2009).

Dismissal of a wrongful death suit was proper because the great-nephew lacked standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was commenced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123, 2008 Miss. LEXIS 485 (Miss. 2008).

Substitution of a son as the party in a wrongful death case was improper because a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989, 2007 Miss. App. LEXIS 467 (Miss. Ct. App. 2007).

Where defendant nursing home filed for Chapter 11 bankruptcy protection, the trial court did not err by dismissing a wrongful death suit against the nursing home brought on behalf of a deceased patient's beneficiaries. The stipulation exempting the wrongful death suit from the bankruptcy did not name decedent's beneficiaries; they were precluded from bringing suit. Estate of Perry v. Mariner Health Care, Inc., 927 So. 2d 762, 2006 Miss. App. LEXIS 24 (Miss. Ct. App. 2006).

Defendants' motion for summary judgment was granted in a niece's action pursuant to Miss. Code Ann. § 11-7-13 to recover for the wrongful death of her great-uncle where (1) defendants alleged that the niece had no standing to bring the suit because she was not among the class of individuals permitted to bring a wrongful death suit by virtue of a blood relationship to the decedent and that she was not a representative of the great-uncle's estate because no estate had ever been opened; (2) in response to defendants' motion, the niece argued only that she should be permitted to amend her complaint to substitute the real party in interest; and (3) amendment could not be permitted just three weeks before trial because defendants would have been prejudiced thereby, and further, because the niece had stated that the great-uncle had no other living blood relatives, standing would still be lacking. Austin v. Mariner Health Care, Inc., 226 F.R.D. 548, 2005 U.S. Dist. LEXIS 8768 (N.D. Miss. 2005).

Wrongful death statute does not provide mechanism to allow courts to bypass statutory order of beneficiaries so that one statutory beneficiary, more removed from deceased under statute yet emotionally closer to deceased, can bring action over proper statutory beneficiary; it is possible that at times best relative to bring wrongful death action, because of his closeness to deceased, might not be relative allowed by statute to bring such action. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Decedent's mother, sister, and brothers are not proper beneficiaries where decedent was survived by minor children, despite fact that children had been adopted by their paternal aunt prior to decedent's death, since law permits adopted children to inherit both through their adoptive parents and natural parents. Fillingame v. Patterson, 704 F. Supp. 702, 1988 U.S. Dist. LEXIS 15575 (S.D. Miss. 1988).

It is clearly established in Mississippi case law that parent is immune to tort suit by his unemancipated minor child, and therefore minor child cannot bring action against father who shot and killed his wife, child's mother; Parental Immunity Doctrine is not affected by case holding that spousal immunity had ceased to exist when it was destroyed by intentional killing of spouse. Veselits v. Veselits, 824 F.2d 391, 1987 U.S. App. LEXIS 10851 (5th Cir. Miss. 1987).

Unemancipated minor child under legal guardianship of grandmother cannot maintain, through grandmother, wrongful death action against her natural father where natural father was convicted of manslaughter for death of wife and natural mother of minor, as there is still mutual love and affection shared by father and daughter, father has not abandoned child, and there exists father's legal duty of support, together with mutual rights of heirship between father and daughter. Veselits v. Veselits, 653 F. Supp. 1570, 1987 U.S. Dist. LEXIS 1348 (S.D. Miss.), aff'd, 824 F.2d 391, 1987 U.S. App. LEXIS 10851 (5th Cir. Miss. 1987).

Illegitimate child has right to inherit in father's wrongful death claim, but such claim must be asserted and established by clear and convincing evidence under §§ 91-1-27 and 91-1-29. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Surviving adoptive brothers and sisters of child killed in automobile collision have right to bring suit under Mississippi wrongful death statute (§ 11-7-13), to exclusion of natural brothers and sisters of adoptive child. McLemore ex rel. McLemore v. Gammon, 468 So. 2d 84, 1985 Miss. LEXIS 2070 (Miss. 1985).

The son of a pedestrian who was killed when struck by a vehicle is a proper person to prosecute a wrongful death action for and on behalf of himself, the other wrongful death beneficiaries of the decedent, and the decedent's personal representative. Hornburger v. Baird, 508 F. Supp. 84, 1980 U.S. Dist. LEXIS 16076 (N.D. Miss. 1980).

Decedent's mother had no standing to bring a wrongful death action under § 11-7-13, even though decedent's will named her as executrix of his estate and sole primary beneficiary, where decedent left surviving him his wife, who was injured in the same accident and died approximately 30 minutes after her husband; a cause of action accrued to the wife even though she survived decedent for only a few minutes, and this cause of action was an asset in her estate, upon which it was entitled to sue pursuant to § 91-7-233; furthermore, decedent's will could not circumvent the wrongful death statute, which created a new and independent cause of action in favor of those named in the statute, and recovery under the statute would become an asset of decedent's estate only if none of the statutory heirs had survived him. Partyka v. Yazoo Development Corp., 376 So. 2d 646, 1979 Miss. LEXIS 2374 (Miss. 1979).

The administratrix or the heirs, but not both, may bring suit for wrongful death pursuant to Code 1942, § 1453. Jones v. Steiner, 481 F.2d 392, 1973 U.S. App. LEXIS 8896 (5th Cir. Miss. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by one of such persons, there can only be one suit for the benefit of all entitled to share in the distribution, and the damages recoverable in such suit are punitive damages, pain and suffering of the deceased and damages that his heirs might have suffered because of their personal relationship with the deceased, such as support and loss of companionship. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

If a deceased is not survived by husband, wife, child, mother, father, brother or sister, suit should be brought by the personal representative for all damages recoverable under the statute, and any sum recovered in such suit is subject to the debts and liabilities of the deceased, and any balance remaining is subject to general distribution. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the personal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damage to real or personal property, funeral expenses and medical expenses. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

Since the legislature studiously avoided any mention of a first cousin as a dependent, beneficiary, or representative of the deceased who could bring an action for wrongful death, where the deceased was a widow and left no children, no father, no mother, no brother and no sister, only the executrix could bring an action as the personal representative of the deceased. Smith v. Garrett, 287 So. 2d 258, 1973 Miss. LEXIS 1328 (Miss. 1973).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of the father, where the father has not acknowledged the child, does not deny an illegitimate child who had not been acknowledged by the deceased equal protection of the laws, in view of the facts that it is a simple matter to prove the maternity of an illegitimate child, but it is infinitely more complex and difficult to prove paternity, and in Mississippi the requirements are simple and easy for a father to legitimize his child under the law. Sanders v. Tillman, 245 So. 2d 198, 1971 Miss. LEXIS 1362 (Miss. 1971).

An adopting parent has a right to bring an action for the wrongful death of his adopted infant child. Bush Constr. Co. v. Walters, 250 Miss. 384, 164 So. 2d 900, 1964 Miss. LEXIS 469 (Miss. 1964).

In the wrongful death statute there is no expression indicating a legislative intent to abrogate the rule that a minor may not sue a parent in tort. Durham v. Durham, 227 Miss. 76, 85 So. 2d 807, 1956 Miss. LEXIS 656 (Miss. 1956).

Where wife died in an automobile accident as a result of the negligent operation of vehicle by her husband, she could not have sued the husband in tort even if she had survived. Durham v. Durham, 227 Miss. 76, 85 So. 2d 807, 1956 Miss. LEXIS 656 (Miss. 1956).

Administratrix has the right to bring a suit against the city for wrongful death of a child. City of Hattiesburg v. Hillman, 222 Miss. 443, 76 So. 2d 368, 1954 Miss. LEXIS 664 (Miss. 1954).

Prior to the 1958 amendment it had been held that under the wrongful death statute, the word parent meant the natural father or mother of the child, and the adoptive parents had no right to sue for the wrongful death of an adopted child. Boroughs v. Oliver, 217 Miss. 280, 64 So. 2d 338, 1953 Miss. LEXIS 430 (Miss. 1953).

There is no distinction in the right to sue as between the personal representative and the survivors and the one who first brings the suit has the right to prosecute and maintain it to a conclusion. Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 57 So. 2d 859, 1952 Miss. LEXIS 483 (Miss. 1952).

Under the statutes the right of action is in the survivors, to be asserted by the personal representative for the benefit of all persons entitled to recover, or by such survivors, and the cause of action is not abated by the death of such survivors. Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 57 So. 2d 859, 1952 Miss. LEXIS 483 (Miss. 1952).

Where the daughter sued her stepfather for wrongfully causing death of her mother, the fact that the mother had she lived could not sue the step-father for assault, does not affect the daughter's right to maintain an action. Deposit Guaranty Bank & Trust Co. v. Nelson, 212 Miss. 335, 54 So. 2d 476, 1951 Miss. LEXIS 455 (Miss. 1951), overruled, Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Decree in proceeding for appointment of administratrix and contract with attorney on part of administratrix for prosecution of death action can have no effect on right of widow and children to institute and maintain suit. Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376, 1934 Miss. LEXIS 58 (Miss. 1934).

As between widow and children on one hand and administratrix or personal representative on the other, one who first brings death action has right to prosecute and maintain it to conclusion. Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376, 1934 Miss. LEXIS 58 (Miss. 1934).

This cause of action for wrongful death does not pass to trustee in bankruptcy. Dent v. Mendenhall, 139 Miss. 271, 104 So. 82, 1925 Miss. LEXIS 137 (Miss. 1925).

While a suit is pending by a personal representative, the widow has no right to sue. J. J. Newman Lumber Co. v. Scipp, 128 Miss. 322, 91 So. 11, 1922 Miss. LEXIS 105 (Miss. 1922).

An employee of a railroad company engaged in interstate commerce cannot recover under this section [Code 1942, § 1453].His rights are controlled by the federal statute. New Orleans, M. & C. R. Co. v. Jones, 111 Miss. 852, 72 So. 681, 1916 Miss. LEXIS 410 (Miss. 1916).

A suit for personal injuries may be revived after the death of the injured party in the name of his administratrix who may in that suit recover such damages as he could have recovered if living and she may thereafter sue for her husband's negligent death, but the second suit must not embrace damages previously sued for. Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 426, 1914 Miss. LEXIS 188 (Miss. 1914).

A suit by the widow and children for the death of the father precludes the administratrix from recovering damages for the same injury. Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 1907 Miss. LEXIS 213 (Miss. 1907), aff'd, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 1910 U.S. LEXIS 2076 (U.S. 1910).

It is competent for the legislature, as was done in Laws 1898, ch. 66, to extend the remedy provided by Const. § 193, so as to authorize actions by others than the legal or personal representatives of the person injured. Bussey v. Gulf & S. I. R. Co., 79 Miss. 597, 31 So. 212, 1901 Miss. LEXIS 108 (Miss. 1901).

An illegitimate daughter cannot sue for the death of another illegitimate daughter. Illinois C. R. Co. v. Johnson, 77 Miss. 727, 28 So. 753, 1900 Miss. LEXIS 59 (Miss. 1900).

An action can be maintained under Code 1906, § 721 by the mother, a sole surviving parent, for the death of her son, an employee, because of negligence of the railroad company in failing to provide safe machinery and appliances, such negligence being that of the company itself, and not the negligence of a co-employee. The ground of liability existed before the Constitution of 1890 and is wholly independent of it. White v. Louisville, N. O. &

T. R. Co., 72 Miss. 12, 16 So. 248, 1894 Miss. LEXIS 73 (Miss. 1894).

It is only where an employee is killed through the negligence of a fellow servant that the action must be brought by the personal representative under Const. § 193. White v. Louisville, N. O. & T. R. Co., 72 Miss. 12, 16 So. 248, 1894 Miss. LEXIS 73 (Miss. 1894).

Independently of the statute, the mother, being the only surviving parent, may maintain a suit for injuries resulting in the death of an infant son, for the time between the injury and death. Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38, 1885 Miss. LEXIS 8 (Miss. 1885).

7. Persons entitled to recover.

Chancellor properly determined that a mother was a wrongful-death beneficiary of a deceased child because the mother was not married to the child's natural father at the time of his birth, and accordingly, the child would be considered an illegitimate child. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Chancellor erred in finding that a deceased child's half-sister was a wrongful death beneficiary and heir-at-law of the child because the record contained no evidence to show that the half-sister was conceived and viable, and, therefore, "living" at the time of the child's death; more than two years after the child's death, the half-sister was approximately one year old, and thus, calculations showed that she was not conceived or possibly in existence at the time of the child's death. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Deceased child's father could not recover wrongful death benefits from the child because the father failed to establish the requirements of Miss. Code Ann. § 91-1-15; the father never met child or introduced the child to his family, he was not listed on the child's birth certificate, he neglected to support the child, and he denied paternity and challenged the mother's efforts to obtain child support and social security benefits from him. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Chancellor did not err in determining that a father's children could not recover wrongful death benefits from his deceased child because the father did not meet the requirements of Miss. Code Ann. § 91-1-15 (3)(a)-(c); the deceased child's sole wrongful death beneficiary was his mother, and she was entitled to the settlement proceeds deriving from his wrongful death. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Trial court properly determined that a child was not a wrongful-death beneficiary of the decedent because, while the decedent signed the child's birth certificate, supported her, and participated in her life for eight years, genetic testing before his death established that he was not the child's father, the mother made no claim that the child was his heir, and the Wrongful Death Statute did not provide a cause of action for in loco children. In re Estate of Smith, 130 So. 3d 508, 2014 Miss. LEXIS 55 (Miss. 2014).

Chancery court properly divided insurance settlement proceeds equally among all the wrongful death beneficiaries, which included the decedent's three half-siblings, because with respect to priority of beneficiaries within the same class, no distinction existed between kindred of whole or half-blood. In re Estate of Eubanks, 197 So. 3d 878, 2014 Miss. App. LEXIS 35 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 197 So. 3d 861, 2015 Miss. LEXIS 83 (Miss. 2015).

Pursuant to Miss. Code Ann. § 11-7-13, a grandfather had standing to bring a wrongful death suit as an interested party from the moment of his grandsons' deaths, but he gained the ability to recover on behalf of the estates only after those estates came into existence and he was appointed administrator. Burley v. Douglas, 26 So. 3d 1013, 2009 Miss. LEXIS 538 (Miss. 2009).

There was no merit to the Georgia relatives' argument that the decedent was an illegitimate child so as to preclude her father's kindred from qualifying as wrongful death beneficiaries; application of the wrongful death statute provides that the decedent's wrongful death beneficiaries included all five of her half-siblings, as well as her mother, and even though the decedent's half-siblings on her father's side never had any contact with her, they were still statutorily entitled to their respective shares of the decedent's estate. Ray v. Ray, 963 So. 2d 20, 2007 Miss. App. LEXIS 512 (Miss. Ct. App. 2007).

Mississippi wrongful death statute provides for the recovery of all the wrongful death beneficiaries in a single lawsuit; thus, when any person statutorily entitled to do so files a wrongful death action, that action enures to the benefit of all parties entitled to recover for the death. Under this scheme, though a minor beneficiary would be disabled from instigating the one suit due to infancy, a personal representative of the deceased or an adult beneficiary could recover on behalf of the minor during the minor's disability. Anderson v. R & D Foods, Inc., 913 So. 2d 394, 2005 Miss. App. LEXIS 294 (Miss. Ct. App. 2005).

Where a decedent was allegedly injured by medication during her life, and allegedly died from it, the estate administrator was to assert both a wrongful death action and a survival action against the drug manufacturer; if the jury found that the drug caused the decedent's death, then the recovery belonged to the wrongful death heirs. If the jury found that the drug did not cause the death, the estate could recover for any personal injuries caused by the drug, and the decedent's ex-husband could recover from the estate amount he was entitled to under the decedent's holographic instrument. England v. England (In re Estate of England), 846 So. 2d 1060, 2003 Miss. App. LEXIS 473 (Miss. Ct. App. 2003).

Because a wrongful death claim accrued at death, a decedent could not have assigned it – or the personal injury component of the wrongful death claim that survived her death pursuant to Miss. Code Ann. § 11-7-13 – to her ex-husband under Miss. Code Ann. § 11-7-3. England v. England (In re Estate of England), 846 So. 2d 1060, 2003 Miss. App. LEXIS 473 (Miss. Ct. App. 2003).

Neither the father of an illegitimate child nor an illegitimate half-brother could recover for the wrongful death of the child where the father never met the child, failed to support the child, and failed to acknowledge the child as his own during the child's lifetime, notwithstanding that he did not receive the results of a blood test that established his paternity until just four days before the child's death. In re Estate of Patterson v. Patterson, 798 So. 2d 347, 2001 Miss. LEXIS 11 (Miss. 2001).

Under wrongful death statute, adopted child was wrongful death beneficiary of his natural father; right to bring wrongful death action for natural father's death was not terminated at time of adoption. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Inheritance laws of Mississippi, where decedent's estate was located, rather than law of Louisiana, pursuant to which decedent's natural child was adopted, applied in determining whether child was wrongful death beneficiary. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Where wrongful death action and action against uninsured motorist coverage for same death are simultaneously pending, uninsured motorist coverage is source of funds from which wrongful death heir who controls prosecution of wrongful death action may satisfy any judgment recovered on behalf of all wrongful death heirs; therefore first wrongful death plaintiff will not be preempted from choosing trial tactics or electing remedies by another wrongful death heir; consolidation of two such suits for purpose of ordering settlement is appropriate. Rampy ex rel. Rampy v. Austin, 718 F. Supp. 556, 1989 U.S. Dist. LEXIS 8463 (S.D. Miss. 1989).

Biological father entitled to inherit from illegitimate child is entitled to share in recovery in wrongful death action. Burdette v. Crump, 472 So. 2d 959, 1985 Miss. LEXIS 2142 (Miss. 1985).

The daughter of a deceased insured was also an insured entitled to recover uninsured motorist benefits where both of the policies at issue defined the term "insured" to include any person entitled to recover damages and where the daughter, under the provisions of this section, would be entitled to maintain a wrongful death action for the death of her mother. Pearthree v. Hartford Acci. & Indem. Co., 373 So. 2d 267, 1979 Miss. LEXIS 2267 (Miss. 1979).

The legislature intended that, if there were no surviving heirs as specifically named and listed in the wrongful death statute, the damages recovered in a wrongful death action would become an asset of the estate to be used as any other asset in the payment of the "just debts of the estate" and then any residue to be distributed according to the last will and testament of the deceased, if there were a will, or under the statute of descent and distribution if there were no will, and where the nearest surviving relatives of the decedent were eleven first cousins, the net proceeds recovered in a wrongful death action were to be distributed to the sole residuary legatee under the last will and testament of the decedent. Smith v. Garrett, 287 So. 2d 258, 1973 Miss. LEXIS 1328 (Miss. 1973).

Under Mississippi's wrongful death statute, an illegitimate child cannot sue for or recover damages for the wrongful death of his father, where the father has not acknowledged the child in any way recognized by Mississippi law. Sanders v. Tillman, 245 So. 2d 198, 1971 Miss. LEXIS 1362 (Miss. 1971).

Two minor children who, after the death of their mother, had been adopted by their paternal grandparents at the behest of the father who continued to contribute to their support, were persons entitled to bring an action for the wrongful death of the father. Alack v. Phelps, 230 So. 2d 789, 1970 Miss. LEXIS 1562 (Miss. 1970).

An heir cannot recover under this section [Code 1942, § 1453] unless the deceased himself could have recovered had he not been killed. Market Ins. Co. v. United States, 415 F.2d 459, 1969 U.S. App. LEXIS 10886 (5th Cir. Miss. 1969).

Where the plaintiffs' evidence made a jury issue of whether as a result of the defendants' intentional torts in the illegal, improper, and perverted use of process for an ulterior motive or purpose, the decedent acted under an irresistible impulse and committed suicide, he would, had he lived, have a good cause of action against the defendants, and under the wrongful death statute his widow and children are entitled to recover damages which decedent could have recovered. s State use of Richardson v. Edgeworth, 214 So. 2d 579, 1968 Miss. LEXIS 1316 (Miss. 1968).

Husband's claim for medical expenses and loss of services of wife sustaining personal injuries survives, but that claim for loss of companionship and consortium does not. Scott v. Munn, 245 Miss. 120, 146 So. 2d 564, 1962 Miss. LEXIS 537 (Miss. 1962).

An employer or insurer paying workmen's compensation for the death of an employee is entitled to share in the proceeds of a settlement of a claim against a third party tortfeasor for causing the employee's death only where the beneficiary of the death action is also a workmen's compensation beneficiary. United States Fidelity & Guaranty Co. v. Higdon, 235 Miss. 385, 109 So. 2d 329, 1959 Miss. LEXIS 440 (Miss. 1959).

Under this statute [Code 1942, § 1453], whichever statutory beneficiary brings an action for wrongful death, the proceeds belong to those entitled as if they had all been named as plaintiffs. Thames v. Mississippi, 117 F.2d 949, 1941 U.S. App. LEXIS 4382 (5th Cir. Miss.), cert. denied, 314 U.S. 630, 62 S. Ct. 63, 86 L. Ed. 506, 1941 U.S. LEXIS 394 (U.S. 1941).

That one statutory beneficiary is person charged as defendant in death action, held not to prevent proportional recovery by other beneficiaries. Nosser v. Nosser, 161 Miss. 636, 137 So. 491, 1931 Miss. LEXIS 286 (Miss. 1931).

8. Proximate cause.

Although wrongful death statute provides for recovery of all damages of every kind, which would certainly include lifetime damages, entire claim under statute must fail where heirs fail to prove by preponderance of evidence that death was caused by defendant. Wilks v. American Tobacco Co., 680 So. 2d 839, 1996 Miss. LEXIS 493 (Miss. 1996).

Circuit Court did not err in granting motion of electric company for directed verdict where: expert testimony did not show that any act or omission of electric company proximately caused or contributed to death of decedent; electric company owed no duty to decedent with respect to electric lines not under its control; electric company neither owned nor controlled wiring beneath which decedent was found; fact that electric meter was moved had nothing to do with accident, where there was no circuit breaker after rewiring, which had been done by someone other than electric company, between transformer and wiring going to place where decedent was killed; and, testimony showed that had breaker been in place and had wiring carrying current from transformer to place where decedent was killed gone through breaker, decedent would still have been shocked when he encountered wires and nothing in that encounter would have tripped breaker in time to save his life. Upton v. Magnolia Electric Power Asso., 511 So. 2d 939, 1987 Miss. LEXIS 2700 (Miss. 1987).

The trauma to decedent's left breast, received in a collision, which caused the metastasis of a dormant cancerous condition was held to have been the proximate cause of her death three years after the date of the accident. New Orleans & N. R. Co. v. Thornton, 191 So. 2d 547, 1966 Miss. LEXIS 1223 (Miss. 1966).

Where jury is warranted in finding that killing of child could have been avoided by defendant through exercise of reasonable care in keeping constant lookout for pedestrians who may chance to use highway, failure of mother to safeguard safety of child in crossing highway does not constitute direct or proximate cause of its death. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

Employer held liable for death of minor fatally burned as result of explosion while cleaning coin-operated machines with gasoline in small room in which there was a gas heater with open flame, notwithstanding immediate activating cause of explosion was running of rat from machine to heater and its return to machine after its fur was ignited. United Novelty Co. v. Daniels, 42 So. 2d 395, 1949 Miss. LEXIS 476 (Miss. 1949).

Where mechanic's helper died as result of a can of gasoline used in priming an engine being thrown on him by the mechanic after the gasoline therein had become ignited when the engine backfired, the employer would be liable if the proximate cause of the accident was the negligence of the employer in failing to furnish a safe priming can, but would not be liable if the proximate cause was the negligence of the mechanic. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

To establish liability under wrongful death statute, negligence complained of must be proximate or at least directly contributing cause of death, and must be proved as a reasonable probability. Berryhill v. Nichols, 171 Miss. 769, 158 So. 470, 1935 Miss. LEXIS 6 (Miss. 1935).

If trespasser's death on railroad tracks resulted from engineer's failure to give warning signals after becoming aware of trespasser's danger, trespasser's administrator was entitled at least to nominal damages. Young v. Columbus & G. R. Co., 165 Miss. 287, 147 So. 342, 1933 Miss. LEXIS 302 (Miss. 1933).

A widow cannot sue for injuries resulting in the death of her husband, an engineer, while running his locomotive, unless the proximate cause of his death was such negligence of the company as showed a want of ordinary care. Illinois C. R. Co. v. Woolley, 77 Miss. 927, 28 So. 26, 1900 Miss. LEXIS 49 (Miss. 1900).

9. Negligence and contributory negligence.

In a wrongful death action arising from a 4-car automobile accident, a driver's negligence in driving at too high a speed on a wet road, with worn tires, and paying insufficient attention to traffic ahead, were foreseeable acts of negligence and are precisely the types of negligence careful drivers of other vehicles must guard against. Thus, the driver's negligence was not an intervening cause sufficient to cut off the liability of another driver. M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615, 1988 Miss. LEXIS 437 (Miss. 1988).

Circuit Court did not err in granting motion of electric company for directed verdict where: expert testimony did not show that any act or omission of electric company proximately caused or contributed to death of decedent; electric company owed no duty to decedent with respect to electric lines not under its control; electric company neither owned nor controlled wiring beneath which decedent was found; fact that electric meter was moved had nothing to do with accident, where there was no circuit breaker after rewiring, which had been done by someone other than electric company, between transformer and wiring going to place where decedent was killed; and, testimony showed that had breaker been in place and had wiring carrying current from transformer to place where decedent was killed gone through breaker, decedent would still have been shocked when he encountered wires and nothing in that encounter would have tripped breaker in time to save his life. Upton v. Magnolia Electric Power Asso., 511 So. 2d 939, 1987 Miss. LEXIS 2700 (Miss. 1987).

The United States, by and through the Corp of Engineers, is liable for the wrongful drowning deaths of swimmers where it was guilty of negligence in its supervision of a dredging operation which created a hazardous condition in the form of a depression surrounded by shallow water. Price v. United States, 530 F. Supp. 1010, 1981 U.S. Dist. LEXIS 10112 (S.D. Miss. 1981), modified, 726 F.2d 1057, 1984 U.S. App. LEXIS 24595 (5th Cir. Miss. 1984).

In a wrongful death action brought by a minor decedent's parents, defendant was not entitled to contribution from the child's father, even though he was a joint tortfeasor, where the child could not have sued his father for damages had death not ensued; further, a diminution of damages was available only when the injured party, not a statutory beneficiary, had been contributorily negligent. Hood v. Dealers Transport Co., 472 F. Supp. 250, 1979 U.S. Dist. LEXIS 12939 (N.D. Miss. 1979).

In a medical malpractice action, a general practitioner who failed to enlist the aid of a chest surgeon after a patient had suffered massive hemorrhaging and was coughing up blood failed to conform to the standard of care required of a general practitioner in his locality. Pittman v. Gilmore, 556 F.2d 1259, 1977 U.S. App. LEXIS 12177 (5th Cir. Miss. 1977).

Defendants failed to discharge their duty to use reasonable and ordinary care to provide protection for minor children playing at or near a motel swimming pool where there was no lifeguard on duty, there were no gates on the fence surrounding the pool, no cover had been placed over the pool, and there was no life saving equipment or warning signs near the pool. Gault v. Tablada, 400 F. Supp. 136, 1975 U.S. Dist. LEXIS 11301 (S.D. Miss. 1975), aff'd, 526 F.2d 1405 (5th Cir. Miss. 1976).

Owners of apartment complex, who were charged with foreseeing the danger presented by a water-filled swimming pool located in the middle of an apartment complex which was occupied by minor children, were negligent where they failed to have a lifeguard on duty, to fence the area in question, to cover the pool, to maintain any resuscitation or rescue equipment, and to drain the pool when it was not expected to be used. Kopera v. Moschella, 400 F. Supp. 131, 1975 U.S. Dist. LEXIS 16768 (S.D. Miss. 1975), aff'd, 526 F.2d 1405 (5th Cir. Miss. 1976).

In an action against an automobile driver for the alleged wrongful death of a minor who was riding a bicycle when it collided with the automobile, a jury verdict in favor of the driver foreclosed all questions of fact, resolved all conflicts in the evidence favorable to the driver, and also amounted to a factual finding by the jury that the driver of the automobile had not been negligent and had acted as a reasonably prudent person would have done under the same or similar circumstances. McCollum v. Randolph, 220 So. 2d 310, 1969 Miss. LEXIS 1452 (Miss. 1969).

Motorist failing to slow down on being blinded by lights of approaching car held liable for death of pedestrian struck while walking on side of road. Layton v. Cook, 248 Miss. 690, 160 So. 2d 685, 1964 Miss. LEXIS 293 (Miss. 1964).

It is no defense to an action for death to child in highway caused by motorist that driver was not responsible because he was only 5 feet 7 inches tall and that his vision of place where child was when hit by car did not begin closer than 63 feet ahead of him, on account of view being obstructed by hood of automobile and open airvent thereon. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

In action under this section [Code 1942, § 1453] for damages for death of child, five-year-old child is prima facie incapable of contributory negligence. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

In action against restaurateur for death to customer by serving food not fit for human consumption, it must be shown that restaurateur did not use that degree of care in the selection, preparation, cooking or serving of the food so injuring the customer as a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table, the restaurateur not being an insurer against injury to his customers. Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397, 1949 Miss. LEXIS 349 (Miss. 1949).

Employer not relieved of liability for death of minor fatally burned by explosion while cleaning coin-operated machine with gasoline in violation of instructions where there was no showing that employee himself was warned. United Novelty Co. v. Daniels, 42 So. 2d 395, 1949 Miss. LEXIS 476 (Miss. 1949).

In suit to recover for death of licensee or trespasser, owner of land is not liable irrespective of his negligence provided it did not amount to willful or wanton negligence. Westmoreland v. Mississippi Power & Light Co., 172 F.2d 643, 1949 U.S. App. LEXIS 2755 (5th Cir. Miss. 1949).

Bus company was not liable for death of passengers who alighted pursuant to their request at safe place on highway opposite their homes when they were struck by a passing automobile while attempting to cross the highway after the bus had gone, even though the bus driver gave no warning of the approaching automobile. Beeson v. Tri-State Transit Co., 146 F.2d 754, 1945 U.S. App. LEXIS 2076 (5th Cir. Miss. 1945).

Plaintiff has burden of showing in action against employer for employee's death that such was caused by the employer's negligence. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

Employer is not liable for death of mechanic's helper caused by the negligence of the mechanic. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

In respect to liability of master for death of employee, while master owes duty to promulgate rules where the work is dangerous and the conditions are obscure or complex, no such duty exists in regard to the use of simple tools and appliances or where the conditions are neither obscure nor complex. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

Even though a mechanic's helper, who dies as result of a can of gasoline used in priming an engine being thrown on him after the gasoline therein had become ignited when the engine backfired, was contributorily negligent in choosing the particular can and in standing in a dangerous position, the jury could properly reduce the damages by virtue of the law of comparative negligence if the jury should find that the employer was liable in negligently failing to furnish a safe priming can. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

An infant cannot be held liable in death action for faults or omission when the duty to act otherwise must find its basis in an agreement by the infant. Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

Fourteen-year-old boy riding on farm tractor on highway, who agreed to warn the tractor operator of approaching traffic but who failed to warn him of a truck which collided with the tractor from the rear, could not be held liable for the death of the tractor operator. Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

Contributory negligence of one of the beneficiaries cannot be used as a defense in an action for damages causing death. Hines v. McCullers, 121 Miss. 666, 83 So. 734, 1920 Miss. LEXIS 112 (Miss. 1920).

In an action by a widow for the death of her husband, the rule that to board a moving train is negligence, as a matter of law, is discussed and the facts held to constitute an exception. Wooten v. Mobile & O. R. Co., 79 Miss. 26, 29 So. 61, 1901 Miss. LEXIS 6 (Miss. 1901).

In an action by a father for the death of his son it was held contributory negligence, as a matter of law, for the latter, an active and intelligent boy between twelve and thirteen years of age, who had knowledge of the danger, to voluntarily jump from a train going twenty miles an hour. Howell v. Illinois C. R. Co., 75 Miss. 242, 21 So. 746, 1897 Miss. LEXIS 95 (Miss. 1897).

Although nurse in charge of two small children attempted to cross railroad track while aware of approach of train, she was not necessarily guilty of contributory negligence, and where there was evidence to the effect that she would have had ample time to cross if she had not been confused by the outcries and commotion of a near-by crowd, finding of jury against contributory negligence in action for death of child would not be disturbed. Alabama & V. R. Co. v. Lowe, 73 Miss. 203, 19 So. 96, 1895 Miss. LEXIS 128 (Miss. 1895).

10. Limitation of actions.

Only when someone who is qualified to bring a wrongful-death suit actually files a wrongful-death suit on the minor beneficiaries' behalf will the minors savings clause not apply, because, once the suit is filed, the running of the statute of limitations is immaterial. Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

To the extent the supreme court held in Curry v. Turner, 832 So. 2d 508 (Miss. 2002), that the mere existence of a person of majority age with statutory standing to file a wrongful-death suit prevents the application of the minors savings clause, the supreme court explicitly overrules this holding; instead, Curry should be limited to its facts. Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

To the extent Curry v. Turner, 832 So. 2d 508 (Miss. 2002), held that the mere existence of someone qualified to bring a wrongful-death suit created an irreconcilable conflict between Miss. Code Ann. § 11-7-13 and Miss. Code Ann. § 15-1-59 and precluded the application of the latter statute, the supreme court explicitly overrules this part of its holding. Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

Mere existence of an aunt as a person with statutory standing to bring a wrongful-death suit did not prevent the application of Miss. Code Ann. § 15-1-53 because the aunt had been neither appointed guardian nor authorized by the chancery court to bring an action on behalf of the deceased's children; the oldest child did not have a guardian appointed who had the legal authority to bring a suit on her behalf, and thus, the savings clause remained in operation. Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

Circuit court properly denied a hospital and a doctor summary judgment because the minors savings statute applied, and thus, the deceased's oldest child had two years from when she reached the age of majority to file a wrongful-death suit based on medical negligence; the deceased's two minor children could rely on the application of the minors savings clause to toll the running of the two-year statute of limitations, and the oldest child timely filed her complaint within two-year period. Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

Miss. Code Ann. § 11-7-13 wrongful-death claims of wrongful-death beneficiaries matured–and Miss. Code. Ann. § 15-1-49, the statute of limitations on those claims, began to run–on April 17, 2000, not because that was the day the decedent died, but rather because that was the first day ("if death had not ensued") the decedent could have brought a claim. Caves v. Yarbrough, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Mississippi wrongful-death statute, Miss. Code Ann. § 11-7-13, despite the Mississippi Legislature's assigned nomenclature, encompasses all claims, including survival claims, which could have been brought by a decedent, wrongful-death claims, estate claims, and other claims resulting from a tort which proximately caused a death. And where death is not an immediate result of the tort, the limitation periods for the various kinds of claims may not begin to run at the same time. Caves v. Yarbrough, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Under Miss. Code Ann. § 11-7-13, wrongful death claims premised on negligence, strict liability, and breach of implied warranties were time-barred under the applicable three-year limitations period of Miss. Code Ann. § 15-1-49, because the claims accrued at the time of diagnosis of the decedent's latent disease and there were no allegations of a confidential or fiduciary relationship to establish a breach of duty of disclosure of toxic substances for a fraudulent concealment claim. Wells v. Radiator Specialty Co., 413 F. Supp. 2d 778, 2006 U.S. Dist. LEXIS 18082 (S.D. Miss. 2006).

Trial court erred in ruling that the minor's savings statute, Miss. Code Ann. § 15-1-59, did not toll the statute of limitations on a wrongful death action; however, once a wrongful death suit was filed in her behalf, the minor no longer enjoyed the protection of § 15-1-59; since there could be but one cause of action under Miss. Code Ann. § 11-7-13, the minor was governed by the same statute of limitations as the decedent's administratrix. Lee v. Thompson, 859 So. 2d 981, 2003 Miss. LEXIS 407 (Miss. 2003).

Provisions of the minor's savings statute, Miss. Code Ann. § 15-1-59, and the wrongful death statute, Miss. Code Ann. § 11-7-13, conflict where there exists a person qualified under § 11-7-13 to bring suit, as § 11-7-13 requires that one suit be brought for damages from wrongful death. Thus, the statute of limitations runs against both the personal representative of the deceased and the deceased's children. Curry v. Turner, 832 So. 2d 508, 2002 Miss. LEXIS 391 (Miss. 2002), limited, overruled in part, Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

A wrongful death action arising in the context of medical negligence is not measured from the date the decedent knew or should have known about the act of negligence, but rather, the cause of action does not accrue until the death of the negligently injured person. Gentry v. Wallace, 606 So. 2d 1117, 1992 Miss. LEXIS 540 (Miss. 1992), overruled, Jenkins v. Pensacola Health Trust, Inc., 933 So. 2d 923, 2006 Miss. LEXIS 208 (Miss. 2006).

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. Brown v. Dow Chemical Co., 777 F. Supp. 504, 1989 U.S. Dist. LEXIS 17546 (S.D. Miss.), aff'd, 889 F.2d 272, 1989 U.S. App. LEXIS 16794 (5th Cir. Miss. 1989).

Cause of action based upon wrongful death statute (§ 11-7-13), being predicated upon defendant's intentional torts, is governed by one year statute of limitations, rather than 6 year statute of limitations, as actions filed pursuant to wrongful death statute must be brought within corresponding prescription statute for which cause of action is predicated. Veselits v. Veselits, 653 F. Supp. 1570, 1987 U.S. Dist. LEXIS 1348 (S.D. Miss.), aff'd, 824 F.2d 391, 1987 U.S. App. LEXIS 10851 (5th Cir. Miss. 1987).

In an action for wrongful death filed by the surviving spouse and children after the statutory limitation period had passed, § 15-1-59, the savings statute, did not toll the limitations period in favor of the children, since the surviving spouse was a person in esse who had the right to file suit for wrongful death during the six-year limitation period after decedent's death, and thus the action was barred. Arender v. Smith County Hospital, 431 So. 2d 491, 1983 Miss. LEXIS 2633 (Miss. 1983).

Where the death of a child which followed almost immediately its birth on December 16, 1964 was caused by the erroneous typing of its mother's blood on April 4, 1958, and the cause of action for the child's death against the infirmary which typed the mother's blood was cast under the provisions of this section [Code 1942, § 1453], the cause of action arose as of the date of the child's death and not as of the date the mother's blood was typed, and the trial court erroneously sustained a plea of the six-year statute of limitations. Smith v. McComb Infirmary Ass'n, 196 So. 2d 91, 1967 Miss. LEXIS 1479 (Miss. 1967).

The limitation period does not condition the right of action under the statute. Triplett v. United States, 213 F. Supp. 887, 1963 U.S. Dist. LEXIS 7940 (S.D. Miss. 1963).

Actions under the statute are, since the amendment of 1908, governed by the general statute of limitations. Triplett v. United States, 213 F. Supp. 887, 1963 U.S. Dist. LEXIS 7940 (S.D. Miss. 1963).

The saving in favor of persons under disability contained in Code of 1892 § 2746, does not apply to actions under this section (Code 1892 § 663), which must be brought within one year after the death, without any saving for those under disability. Foster v. Yazoo & M. V. R. Co., 72 Miss. 886, 18 So. 380, 1895 Miss. LEXIS 40 (Miss. 1895).

11. Actions in general.

Holding that wrongful-death suit filed in Mississippi was subject to dismissal during the pendency of a suit for the same wrongful death in a sister state, pursuant to Miss. Code Ann. § 11-7-13, rested upon the wrongful-death statute's one-suit requirement and the procedural rules developed to manage wrongful-death litigation consistent with that requirement. The decision did not erode the general rule that a previously-filed action in a sister state was no bar to an action in Mississippi. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589, 2010 Miss. LEXIS 93 (Miss. 2010).

Wrongful death action against medical defendants and a casino should not have been severed because such severance violated the requirement in Miss. Code Ann. § 11-7-13 of "one suit for the same death," and was also inconsistent with Miss. Code Ann. § 85-5-7. Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652, 2007 Miss. LEXIS 472 (Miss. 2007).

Since personal representative of decedent was expressly authorized by statute to commence wrongful death action for benefit of all heirs entitled to recover, personal representative had sufficient standing to determine heirship of testator's reputed illegitimate children for purposes of wrongful death statute. Jones v. Estate of Richardson (In re Estate of Richardson), 695 So. 2d 587, 1997 Miss. LEXIS 240 (Miss. 1997).

Provision of wrongful death statute under which heirs may recover "whether an estate has been opened or not" allows heirs to bring wrongful death suit without regard to administration of estate, but is irrelevant to issue of elements which must be proven in order to recover for wrongful death. Wilks v. American Tobacco Co., 680 So. 2d 839, 1996 Miss. LEXIS 493 (Miss. 1996).

For purposes of venue, cause of action in wrongful death case may occur and/or accrue in both county where death occurred and county where alleged negligence took place, making either county, if they are different, permissible venue. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

Wrongful death action arising out of medical care and/or treatment rendered to decedent by physicians was properly venued either in county where alleged negligence occurred or in county where decedent died. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

In a medical malpractice action arising from the death of a child, the county where the wrongful death beneficiaries resided was the proper venue for the action, even though the cause of action accrued in another county in which all of the defendants resided at the time the cause of action accrued, where one of the defendants had become a resident of the state of Louisiana at the time the complaint was filed. Senatobia Community Hosp. v. Orr, 607 So. 2d 1224, 1992 Miss. LEXIS 604 (Miss. 1992), overruled, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. Brown v. Dow Chemical Co., 777 F. Supp. 504, 1989 U.S. Dist. LEXIS 17546 (S.D. Miss.), aff'd, 889 F.2d 272, 1989 U.S. App. LEXIS 16794 (5th Cir. Miss. 1989).

The Mississippi long-arm statute (Code 1972, § 13-3-57) could be utilized in an action for the wrongful death, pursuant to Code 1972, § 11-7-13, of a nonresident decedent, where the plaintiff was a Mississippi resident suing as administrator of the decedent's estate pursuant to letters of administration granted by a Mississippi chancery court. McAlpin v. James McKoane Enterprises, Inc., 395 F. Supp. 937, 1975 U.S. Dist. LEXIS 12161 (N.D. Miss. 1975), disapproved, Estate of Portnoy v. Cessna Aircraft Co., 730 F.2d 286, 1984 U.S. App. LEXIS 23318 (5th Cir. Miss. 1984).

An instance where a suit by decedent dying after suit and revived by his executrix barred the recovery on suit by the executrix thereafter filed. Edward Hines Yellow Pine Trustees v. Stewart, 135 Miss. 331, 100 So. 12, 1924 Miss. LEXIS 85 (Miss. 1924).

A second suit cannot be brought under the same cause in behalf of a child unborn at the time first suit was instituted. Gulf & S. I. R. Co. v. Bradley, 110 Miss. 152, 69 So. 666, 1915 Miss. LEXIS 4 (Miss. 1915).

Where death results from an injury sued for, only one suit can be instituted. Foster v. Hicks, 93 Miss. 219, 46 So. 533, 1908 Miss. LEXIS 88 (Miss. 1908).

12. —Joinder of actions.

Trial court properly granted a joinder motion by a deceased child's father in a wrongful death action brought by the child's mother because both *Long*and the statute mandated such an outcome. Dooley v. Byrd (In re Dooley), 64 So. 3d 951, 2011 Miss. LEXIS 297 (Miss. 2011).

Mississippi wrongful death action was properly dismissed due to the pendency of a prior-filed Louisiana wrongful-death action because under Mississippi's wrongful-death statute–Miss. Code Ann. § 11-7-13–there was to be one suit for the same death; under Long v. McKinney, 897 So. 2d 160 (Miss. 2005), all claims had to be joined in that single action. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589, 2010 Miss. LEXIS 93 (Miss. 2010).

Administratrix's negligence claims against the healthcare providers and doctors was wrongful death case, and as such was a Miss. R. Civ. P. 19 compulsory joinder case and governed by Miss. Code Ann. § 11-7-13; thus, the trial court erred by transferring venue as to each doctor to separate counties, and venue for the wrongful death claim was proper in Bolivar County. Rose v. Bologna, 942 So. 2d 1287, 2006 Miss. LEXIS 550 (Miss. 2006).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

Where wrongful death action and action against uninsured motorist coverage for same death are simultaneously pending, uninsured motorist coverage is source of funds from which wrongful death heir who controls prosecution of wrongful death action may satisfy any judgment recovered on behalf of all wrongful death heirs; therefore first wrongful death plaintiff will not be preempted from choosing trial tactics or electing remedies by another wrongful death heir; consolidation of two such suits for purpose of ordering settlement is appropriate. Rampy ex rel. Rampy v. Austin, 718 F. Supp. 556, 1989 U.S. Dist. LEXIS 8463 (S.D. Miss. 1989).

Where death occurs to two persons at the same time under the identical facts, and beneficiaries are the same as to both persons, the action may be joined for damages for the death of both. Payne v. Moore, 126 Miss. 693, 89 So. 225, 1921 Miss. LEXIS 63 (Miss. 1921).

A suit for the death of the wife and daughter may be joined in one action where the death happened at the same time and due to the same facts of alleged negligence. Hines v. McCullers, 121 Miss. 666, 83 So. 734, 1920 Miss. LEXIS 112 (Miss. 1920).

13. —Removal of cause.

In a wrongful death case that had been removed to federal court and in which plaintiffs moved to remand, a car driver, who was a non-diverse defendant, had been improperly joined and had to be dismissed; with his dismissal the court had jurisdiction because the parties were diverse. While plaintiffs had asserted that the car driver was liable under the Mississippi Wrongful Death Statute, Miss. Code Ann. § 11-7-13, which required that all defendants be brought before the court in one suit, they had testified, under oath, that the sole cause of the accident at issue was the action of truck driver and that the car driver did not cause the accident in any way. Morris v. P & S Transp., Inc., 2008 U.S. Dist. LEXIS 17287 (N.D. Miss. Feb. 29, 2008).

A wrongful death action brought by a resident of Maine as administrator against a Maine corporation was removable to the Federal court on the ground of diversity of citizenship in view of this section [Code 1942, § 1453] under which a decedent's widow and children are alone entitled to the damages for his death, and such resident widow and children were the "real parties in interest." Mississippi Power Co. v. Archibald, 189 Miss. 332, 196 So. 760, 1940 Miss. LEXIS 116 (Miss. 1940).

14. Pleading.

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the personal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damages to real or personal property, funeral expenses and medical expenses. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

In an action against electric power association for death of the deceased as result of electrocution wherein the electric power association did not plead as an affirmative defense that the wife of the deceased who came to her death by electrocution on the same occasion survived her husband, the court properly refused an instruction that in event the jury should believe from preponderance of evidence that the wife survived her husband, the amount of the verdict, if any, should be for nominal damages only, or in such amount as would compensate for the loss of the companionship of her husband during the brief period of time that she survived him. Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 57 So. 2d 859, 1952 Miss. LEXIS 483 (Miss. 1952).

In an action under this section [Code 1942, § 1453] it is not necessary to allege or prove that decedent left any relatives or creditors surviving. Yazoo & M. V. R. Co. v. Barringer, 138 Miss. 296, 103 So. 86, 1925 Miss. LEXIS 51 (Miss. 1925).

It must be alleged and shown how the injury complained of occurred and that negligence of the defendant caused it. Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735, 1909 Miss. LEXIS 241 (Miss. 1909).

15. Issues, proof and variance.

Wrongful death action is to compensate beneficiary for loss of companionship and society of decedent, pain and suffering of decedent between time of injury and death, and punitive damages and, thus, beneficiary need only establish some of those elements in order to recover for decedent's wrongful death. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Variance between declaration alleging railroad's failure to give statutory crossing signals and proof of failure to give common-law warning to trespasser on tracks after notice of danger held not to require reversal. Young v. Columbus & G. R. Co., 165 Miss. 287, 147 So. 342, 1933 Miss. LEXIS 302 (Miss. 1933).

A mother cannot recover damages for her son's prospective earnings in the absence of proof. Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735, 1909 Miss. LEXIS 241 (Miss. 1909).

16. Parties.

In a wrongful death case, the tutrix of a minor child had been misjoined under Fed. R. Civ. P. 21 because she was not an indispensable party under the Fed. R. Civ. P. 19 factors. Under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13 (Rev. 2002), the guardian of another minor child had fiduciary obligation to other beneficiaries who were not joined in the lawsuit, and the interests of the tutrix would be represented by counsel for the guardian. Walker v. Smitty's Supply, Inc., 2008 U.S. Dist. LEXIS 37226 (S.D. Miss. Apr. 23, 2008).

Miss. Code Ann. § 11-1-60(2)(a) instituted a cap on noneconomic damages recoverable by "the plaintiff," and under Miss. Code Ann. § 1-3-33, words written in the singular were to be read in the plural; therefore, a cap on noneconomic damages applied to all plaintiffs who brought a wrongful-death action pursuant to Miss. Code Ann. § 11-7-13. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555, 2007 Miss. LEXIS 649 (Miss. 2007).

Under Fed. R. Civ. P. 19(a), a widow and her children were indispensable parties to a wrongful death suit of a decedent's former wife because Miss. Code Ann. § 11-7-13 provided for a single wrongful death action that encompassed all related claims; thus, the former wife's federal suit was dismissed because the widow's presence destroyed diversity jurisdiction, but the former wife was permitted to join the widow's state court wrongful death suit. Harpster v. Thomas, 442 F. Supp. 2d 349, 2006 U.S. Dist. LEXIS 46777 (S.D. Miss. 2006).

Trial court erred as a matter of law when it denied defendant equipment manufacturer's motion for summary judgment; a wrongful death claim was not assignable by a wrongful death beneficiary to one tortfeasor to be asserted against another joint tortfeasor. Mississippi's wrongful death statute did not confer upon a tortfeasor the right of assignment of a plaintiff's wrongful death cause of action. Coleman Powermate, Inc. v. Rheem Mfg. Co., 880 So. 2d 329, 2004 Miss. LEXIS 1033 (Miss. 2004).

When the personal representative of a decedent person brings an action under Code 1942, § 1453 he is the real party in interest though not necessarily the person who will ultimately benefit from the recovery; and the fact that citizenship of some of the absent statutory beneficiaries is the same as the citizenship of the defendant does not destroy complete diversity. Harris v. Johnson, 345 F. Supp. 516, 1972 U.S. Dist. LEXIS 12657 (N.D. Miss. 1972).

In an action brought under Code 1942, § 1453 the citizenship of the personal representative of the decedent is determinative of the diversity issue. Harris v. Johnson, 345 F. Supp. 516, 1972 U.S. Dist. LEXIS 12657 (N.D. Miss. 1972).

In a wrongful death action the citizenship of the administrator for the decedent is determinative on the issue of diversity. Harris v. Johnson, 345 F. Supp. 516, 1972 U.S. Dist. LEXIS 12657 (N.D. Miss. 1972).

By the use of the word "may" in the phrase "all parties interested may join the suit" it is apparent that it is not mandatory that all interested persons join a wrongful death action, and thus the fact that 2 survivors resided in Mississippi did not defeat total diversity required for federal jurisdiction, since they were not necessary parties to the action. Allen v. Baker, 327 F. Supp. 706, 1968 U.S. Dist. LEXIS 12798 (D. Miss. 1968).

Where the administratrix had made an election to sue for the death of her decedent under this section [Code 1942, § 1453], the mere reference to the Workmen's Compensation Act did not serve to convert the case to one based upon tort and the Act, so that the next of kin and beneficiaries would become necessary and indispensable parties, and, the federal court was not deprived of jurisdiction based upon diversity of citizenship on the theory that such beneficiaries and indispensable parties were citizens of the same state as the defendant. Hordge v. Yeates, 157 F. Supp. 411, 1957 U.S. Dist. LEXIS 2520 (D. Miss. 1957).

Where administratrix did not institute suit for death of decedent, she was not necessary party to death action brought by widow and children of intestate. Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376, 1934 Miss. LEXIS 58 (Miss. 1934).

17. Evidence.

Under Miss. R. Civ. P. 50, the medical facility's motion for judgment notwithstanding the verdict should have been granted where, under Miss. Code Ann. § 11-7-13, the husband presented no evidence regarding any damages sustained from loss of society and companionship, and claims of the estate or other wrongful-death economic damages were not at issue. River Region Med. Corp. v. Patterson, 975 So. 2d 205, 2007 Miss. LEXIS 648 (Miss. 2007).

In the family's wrongful death action, the treating nurses testified that prior to vomiting, the decedent was wearing an oxygen mask, not a bi-level positive airway pressure mask (BIPAP), and that after he vomited a nurse switched him to a nasal bi-prong which provided oxygen through the nose, rather than a mask of any type. One treating nurse, testified that a patient would not aspirate with a nasal bi-prong or a standard oxygen mask; since conflicts in the evidence were to be resolved in the prevailing party's favor (in the trial court), a reasonable jury could have believed that the decedent was not wearing a BIPAP mask when he vomited, and that one issue undermined the family's position that "overwhelming evidence" established the hospital's liability. Burr v. Miss. Baptist Med. Ctr., 909 So. 2d 721, 2005 Miss. LEXIS 385 (Miss. 2005).

In a wrongful death action, the decedent's "personal photo album" was admissible on the issue of damages where it was critical to the plaintiff's case to humanize the decedent and to demonstrate to the jury that the 85-year-old decedent was well and healthy prior to the accident. Additionally, testimony of friends of the decedent was essential to determine the state of the decedent's physical condition prior to his death, even though some of the testimony was duplicative of testimony given by the plaintiff and her son where the testimony of the plaintiff and her son was verified and corroborated by the testimony of the other witnesses who, unlike the plaintiff and her son, had no financial stake in the matter. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

It was reversible error to admit investigating officer's testimony that no traffic citation was issued to tractor-trailer driver as result of incident resulting in death, of plaintiff's son; trial court also erred in refusing to admit evidence that decedent, 2 or 3 months before his death had attempted suicide by lying down in highway in path of truck. Hughes v. Tupelo Oil Co., 510 So. 2d 502, 1987 Miss. LEXIS 2608 (Miss. 1987).

Trial court erred in refusing to admit evidence that decedent's blood alcohol content, tested at request of investigating officer, was .15 percent, because statutory privilege in § 63-11-43 [Repealed] prohibiting admission, in civil trial, of blood alcohol tests taken pursuant to state's implied consent law, had been abrogated by adoption of Mississippi Rules of Evidence; officer who requested test did not have authority to do so, since implied consent law authorized blood alcohol test on dead or unconscious drivers whom investigating officer believed to have been operating motor vehicle while intoxicated, and there was no evidence that decedent had been operating motor vehicle; however, admission was proper because exclusion of this relevant evidence would have no deterrent effect on officer who ordered test, and would only penalize defendants. Hughes v. Tupelo Oil Co., 510 So. 2d 502, 1987 Miss. LEXIS 2608 (Miss. 1987).

Testimony of an expert in the field of economics as to the reasonable economic probability of a male similarly situated as was the decedent, was too speculative to be of any real value to the jury in making up a true verdict. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

In wrongful death action where decedent succumbed when a television antenna he was erecting came into contact with defendant's power line, testimony of neighbor that some 6 years earlier her lights went off and she observed power company workers as they removed a television antenna belonging to another neighbor from the electric lines here involved, near the place where the second accident occurred, was admissible to show that antennas constructed since the power line was installed along the edge of the street, were likely to fall on the line and cause damage unless the power line was properly isolated, insulated or guarded so as to prevent injury upon contact with antennas along the street where defendant power company was licensed to operate. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

Testimony showing any change in conditions on which a wrongful death action is based is competent as against the rights of the persons affected, and testimony may be introduced to show the remarriage of the widow after the death of the husband for which the suit is brought. Campbell v. Schmidt, 195 So. 2d 87, 1967 Miss. LEXIS 1436 (Miss. 1967).

Doctrine of res ipsa loquitur does not apply in an action against restaurant operator for death of customer allegedly caused by ptomaine poisoning. Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397, 1949 Miss. LEXIS 349 (Miss. 1949).

A directed verdict for the defendant in a malpractice suit was sustained and the doctrine of res ipsa loquitur held not to apply where the only witness for the plaintiff was the mother of the deceased child who testified that the defendant performed a tonsillectomy upon the child and that the child died in the hospital shortly thereafter. Sanders v. Smith, 200 Miss. 551, 27 So. 2d 889, 1946 Miss. LEXIS 322 (Miss. 1946).

Where, in action for death of child resulting from explosion of lamp predicated on negligence of defendant in supplying filling station with gasoline instead of kerosene, judgment in favor of plaintiff based upon testimony of twelve-year-old witness that he filled the lamp from the can which was brought from the filling station would impute wilful and corrupt perjury to nine adult witnesses, six of whom were disinterested and unimpeached, whose testimony exonerated defendant from any negligence, in the respect alleged, judgment was reversible as against the great weight of the evidence. Standard Oil Co. v. Henley, 199 Miss. 819, 25 So. 2d 400, 1946 Miss. LEXIS 250 (Miss. 1946).

To recover damages in death action for physical pain and mental anguish suffered by deceased between time of accident and his death, plaintiff must sustain burden of proof that deceased retained consciousness after the accident. Standard Oil Co. v. Crane, 199 Miss. 69, 23 So. 2d 297, 1945 Miss. LEXIS 270 (Miss. 1945), overruled in part, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 1985 Miss. LEXIS 1942 (Miss. 1985).

Dying declarations of decedent are not admissible in civil actions for wrongful death. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

Where railroad company, defendant in action for death of pedestrian struck by train at crossing, took deposition of fireman because he was then in the armed forces, but did not introduce it, plaintiffs' use thereof, as if it had been introduced, in the examination of other witnesses, was improper. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

Evidence, in action for death of pedestrian struck by train at crossing, that the fireman was drunk immediately after the accident, was inadmissible in the absence of showing that anything done or omitted by the fireman had any causal connection with the injury. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

When a person is injured or killed on a public railroad crossing, the failure to ring the bell or sound the whistle as required by statute will raise the presumption prima facie that the injured person would have heard and acted upon the warning had it been given, and that if an opposite conclusion is to be reached the burden is upon the railroad company to meet the presumption by proof. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

Plaintiff has burden of showing in action against employer for employee's death that such was caused by the employer's negligence. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

A motorist may be found by the jury to have been in the exercise of due care and hence not liable under this statute [Code 1942, § 1453] for the death of a child where there is evidence that other vehicles obstructed his view in such a way that he could not see the child until close upon it. Moser v. Hand, 81 F.2d 522, 1936 U.S. App. LEXIS 3478 (5th Cir. Miss. 1936).

Evidence that doctor was negligent in treating deceased for gunshot wound held insufficient to establish liability of doctor for wrongful death of deceased from pulmonary embolism. Berryhill v. Nichols, 171 Miss. 769, 158 So. 470, 1935 Miss. LEXIS 6 (Miss. 1935).

Life expectancy of healthy men is competent evidence where the only infirmity of decedent was his deafness. Mississippi C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838, 1914 Miss. LEXIS 36 (Miss. 1914).

As to the competency of mortuary tables where the deceased was an asthmatic, and asthmatics were not embraced in such tables. Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735, 1909 Miss. LEXIS 241 (Miss. 1909).

In an action by an employee, claimed to have been injured by being thrown under a car while engaged in switching by stumbling over slag, it was competent for the railroad company to show that slag is commonly used by responsible railroad companies as ballast. Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283, 1902 Miss. LEXIS 306 (Miss. 1902).

In such actions evidence to show the poverty of the plaintiff is not admissible. Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283, 1902 Miss. LEXIS 306 (Miss. 1902).

Evidence that no previous accident had occurred at the same place was held admissible. And it was also held to be competent for defendant's attorneys to comment on the absence of evidence of any previous accident at the same place. Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283, 1902 Miss. LEXIS 306 (Miss. 1902).

Evidence that the train was short on hands and that plaintiff, a flagman, was performing extra duties, was inadmissible, there being no claim that shortness of hands contributed to the injury. Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283, 1902 Miss. LEXIS 306 (Miss. 1902).

18. Questions for jury.

Circuit Court erred when it granted judgment for railroad notwithstanding verdict of jury where, while greater weight of credible evidence supported view that emergency whistle was sounded, there was in record some credible evidence that whistle never sounded. Maxwell v. Illinois C. G. Railroad, 513 So. 2d 901, 1987 Miss. LEXIS 2793 (Miss. 1987).

In a civil suit seeking recovery of damages for the deaths of two persons and injuries to three others as a result of being struck by gunfire laid down by a detachment of officers who were on a college campus as a result of student disorders, there was sufficient evidence to submit to the jury questions as to whether the respective officers were privileged to fire in self-defense or to suppress a riot, whether they employed excessive deadly force or fired without due regard to the safety of others, whether any one or more of them was an actual cause of harm to any plaintiff, and whether any supervisory or command officers were liable. Burton v. Waller, 502 F.2d 1261, 1974 U.S. App. LEXIS 6442 (5th Cir. Miss. 1974), cert. denied, 420 U.S. 964, 95 S. Ct. 1356, 43 L. Ed. 2d 442, 1975 U.S. LEXIS 847 (U.S. 1975).

Whether or not a defendant power company should have anticipated that person using due regard for their own safety in constructing, erecting and using television antennas in a congested area would likely come into contact with its dangerous powerlines so that it became its duty to isolate, insulate or guard its lines against the likelihood of such contact with its lines by the lawful use of the inhabitants and the issue as to the necessity of a warning and whether or not the power company failed to perform its duty in this regard were questions of fact for the jury. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

The question of whether a general contractor, in constructing a wooden scaffolding for use of employees of a subcontractor who installed steel beams in a corridor, had provided a safe place for subcontractor's employees to work was one for the jury. Oden Constr. Co. v. McPhail, 228 So. 2d 586, 1969 Miss. LEXIS 1394 (Miss. 1969).

Whether bus driver was negligent in failing to ascertain whereabouts of passenger who alighted from bus before starting bus and fatally striking her, was for the jury. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

In action for death of five-year-old child by driver of car on highway, it was for jury to say whether child climbed over curb or entered highway through vent and if driver of car could have seen it in time to avoid accident if he had been keeping constant lookout and anticipating presence of pedestrians in highway as required by law. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

Whether operators of locomotive failed to give warning signals after they became aware of danger of pedestrian killed on tracks held, under evidence, for jury. Young v. Columbus & G. R. Co., 165 Miss. 287, 147 So. 342, 1933 Miss. LEXIS 302 (Miss. 1933).

19. Instructions.

This section does not require that jury know identity of beneficiaries, therefore court need not have informed jury that plaintiff's children would have been primary beneficiaries of any wrongful death damages it awarded; court properly rejected plaintiff's argument that jury assumed that plaintiff would be sole recipient of damages and thus the interests of the children were unfairly prejudiced. Munn v. Algee, 924 F.2d 568, 1991 U.S. App. LEXIS 3050 (5th Cir. Miss.), cert. denied, 502 U.S. 900, 112 S. Ct. 277, 116 L. Ed. 2d 229, 1991 U.S. LEXIS 4951 (U.S. 1991).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court's error in refusing a jury instruction that the defendant truck driver was negligent as a matter of law due to intoxication was cured by the jury finding in favor of the plaintiff. Hasson v. Hale, 555 So. 2d 1014, 1990 Miss. LEXIS 6 (Miss. 1990).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court erred in granting a comparative negligence instruction where the only act of negligence claimed by the defendant truck driver was that the decedent drove her car onto his side of the highway since, if the jury had found the decedent negligent in driving onto the wrong side of the road, they would have been duty bound to find for the defendant. Hasson v. Hale, 555 So. 2d 1014, 1990 Miss. LEXIS 6 (Miss. 1990).

Instruction misrepresenting law concerning duty to stop train when trespasser's position of peril is recognized in time to stop train was unsupported by law; instruction failing to make clear that railroad's duty of reasonable care arose only when its engineer and firemen first saw decedent on railroad tracks was error; and, instruction should further tell jury that railroad's duty was to exercise reasonable care under particular circumstances with which it was confronted. Maxwell v. Illinois C. G. Railroad, 513 So. 2d 901, 1987 Miss. LEXIS 2793 (Miss. 1987).

Electric power company's instruction to the effect that decedent was presumed to have seen an electric power line and to have known of its presence, was properly refused since there was no presumption to that effect, and moreover, such instruction was an attempt to instruct on the weight and worth of the evidence by adding an inference in violation of Code 1942, § 1530. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

Plaintiff's instruction to the effect that an electric power company was required to maintain its lines in such a manner as to prevent it from being dangerous to the public, was erroneous since if it were required so to do, a power company would be an insurer against all injuries to persons and property. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

In view of this provision, it is erroneous to give an instruction the effect of which is to permit one beneficiary's contributory negligence to be imputed to all the beneficiaries. Delta Elec. Power Ass'n v. Burton, 240 Miss. 209, 126 So. 2d 258, 1961 Miss. LEXIS 451 (Miss. 1961).

Instructing jury in death action that they may consider the present net cash value of deceased's life at the time of death is not error. Ashcraft v. Alford, 236 Miss. 25, 109 So. 2d 343, 1959 Miss. LEXIS 289 (Miss. 1959).

In suit to recover for death of passenger killed while passing in front of bus after alighting, instructions when taken collectively that no liability attached until jury found that passenger's death was caused by driver's failure to keep a reasonable lookout, was proper. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

Instruction authorizing jury to consider on question of damages the value of services of deceased to her husband, and the value of her association, society, and companionship to her husband and children, was proper. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

In determining right of defendant to peremptory instruction to recover for death of customer allegedly caused by ptomaine poisoning, the court must assume as true everything which the evidence establishes either directly or by reasonable inferences which the jury might reasonably draw from such evidence, subject to the limitation, however, that a presumption cannot arise from another presumption. Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397, 1949 Miss. LEXIS 349 (Miss. 1949).

In action for death of child caused by negligent act of defendant, an instruction authorizing jury to take into consideration "any negligence on the part of the deceased child" is properly refused as the instruction fails to set forth elements of such negligence, if any, and its proximate contribution to injuries. Stevenson v. Robinson, 37 So. 2d 568 (Miss. 1948).

An instruction allowing jury to find negligence without giving a guide as to what specific acts or omissions within the pleadings and proof are sufficient to constitute actionable negligence, is erroneous. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

Roving instructions, in action for wrongful death of pedestrian struck by train at crossing, authorizing recovery if jury believed from preponderance of the evidence that defendant railroad company was guilty of any negligence which proximately caused or contributed to the injury, was erroneous, which error was not cured by other instructions charging jury that unless they believed from the evidence that decedent was struck at the crossing they must find for the defendant. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

Where there was no evidence as to how accident occurred resulting in death of mechanic's helper allegedly caused by mechanic throwing can of flaming gasoline on him, trial court erred in refusing defendant employer's motion for directed verdict, but judgment would be reversed for a new trial rather than for a judgment notwithstanding the verdict in view of the confusion at the trial as to the status and effect of the pleadings. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

Instruction, in action by parents to recover for wrongful death of their two minor sons, that jury could also find for the plaintiffs for such "amount of money that the evidence shows that these boys might have voluntarily contributed to their parents after they reach 21 years of age," constituted reversible error, where there was no evidence to justify the instruction. Alabama G. S. R. Co. v. Johnson, 140 F.2d 968, 1944 U.S. App. LEXIS 4090 (5th Cir. Miss. 1944).

In view of the provisions of the statute that the "parties suing shall recover such damages as the jury may determine to be just" it is error to charge the jury that the damages to be awarded for the death of an infant "can never amount to what might be said to be substantial damages" and that unless the verdict should exceed the sum of $2500 or $3000 it would not be considered substantial damages. Wood v. Morrow, 119 F.2d 776, 1941 U.S. App. LEXIS 3831 (5th Cir. Miss. 1941).

Instruction that plaintiffs were entitled to reasonable compensation for damages as proximate result of negligence of defendants in death of brother and son held not erroneous. Gulf Refining Co. v. Miller, 153 Miss. 741, 121 So. 482, 1929 Miss. LEXIS 75 (Miss. 1929).

In action for death of brother and son, instruction excluding loss of society and companionship as element of damages held properly refused. Gulf Refining Co. v. Miller, 153 Miss. 741, 121 So. 482, 1929 Miss. LEXIS 75 (Miss. 1929).

In action for death refusal of instruction that evidence did not authorize damages for loss of pecuniary profits to be derived after decedent became twenty-one held harmless error. Gulf Refining Co. v. Miller, 153 Miss. 741, 121 So. 482, 1929 Miss. LEXIS 75 (Miss. 1929).

Instruction authorizing recovery by mother and brother of deceased minor for present value of deceased's life expectancy held erroneous. Gulf & S. I. R. Co. v. Simmons, 150 Miss. 506, 117 So. 345, 1928 Miss. LEXIS 182 (Miss. 1928).

Peremptory instruction requested by defendant railroad company in action against it for running over and killing plaintiff's child was properly refused where there was evidence of defendant's negligence to go to the jury. Alabama & V. R. Co. v. Lowe, 73 Miss. 203, 19 So. 96, 1895 Miss. LEXIS 128 (Miss. 1895).

20. Execution on judgment.

In execution on a judgment for the death of the father obtained by the widow, the children are co-plaintiffs with the widow and the sheriff owes them the same duty he does the widow if he knows of their interest. Kelly v. Howard, 98 Miss. 543, 54 So. 10, 1910 Miss. LEXIS 93 (Miss. 1910); Howard v. Kelly, 111 Miss. 285, 71 So. 391, 1916 Miss. LEXIS 287 (Miss. 1916).

21. Attorney fees.

While the Court of Appeals properly affirmed a chancellor's determination that a decedent's half-siblings were entitled to an equal distribution under the wrongful-death statute and that the proceeds were to be equally divided, because the Supreme Court of Mississippi was split on whether the administratrix's attorneys had an actual conflict of interest with the half-siblings and acted adverse to their interests with respect to the issue of attorney fees, the Court of Appeals' opinion and holding on that issue, reversing in part and remanding, had to stand. Huber v.

Eubanks (In re Estate of Eubanks), 197 So. 3d 861, 2015 Miss. LEXIS 83 (Miss. 2015).

In a wrongful death case, the original judge properly ordered that the decedent's two heirs join their lawsuits pursuant to Miss. Code Ann. § 11-7-13, but the adult heir was allowed to retain the attorneys the adult heir had chosen, and their work substantially contributed to the wrongful death settlement; thus, the adult heir's attorneys were entitled to attorneys' fees, and the appellate court rendered judgment holding that the attorneys would be paid for their work. Franklin v. Franklin, 858 So. 2d 110, 2003 Miss. LEXIS 63 (Miss. 2003).

Because there was no evidence that the decedent's widow gave informed written consent to the representation and fee arrangement between the decedent's son and his attorney in the wrongful death action, the attorney was entitled to contingency fees based on the son-attorney contract only with respect to the son's portion of the settlement proceeds. Willing v. Benz, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

Appellant attorneys were entitled to compensation based upon their contribution to the wrongful death case and their justifiable reliance on the first judge's order granting all attorneys a fee based on their contracts with their respective clients; thus, the second judge improperly denied them attorneys' fees. Franklin v. Franklin, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002), op. withdrawn, sub. op., 858 So. 2d 110, 2003 Miss. LEXIS 63 (Miss. 2003).

Attorney who substantially contributes to a wrongful death settlement should be compensated for the attorney's time and effort. Franklin v. Franklin, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002), op. withdrawn, sub. op., 858 So. 2d 110, 2003 Miss. LEXIS 63 (Miss. 2003).

There is no authority for the proposition that the wrongful death statute, Miss. Code Ann. § 11-7-13, does not allow heirs to be individually represented by counsel of their choice. Franklin v. Franklin, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002), op. withdrawn, sub. op., 858 So. 2d 110, 2003 Miss. LEXIS 63 (Miss. 2003).

An attorney who successfully prosecutes a wrongful death claim without representing all of the heirs must prove that the attorney has earned a fee from the proceeds distributed to all the heirs. Franklin v. Franklin, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002), op. withdrawn, sub. op., 858 So. 2d 110, 2003 Miss. LEXIS 63 (Miss. 2003).

22. Damages.

While wrongful death beneficiaries were entitled to share equally in the damages awarded to decedent's estate (funeral expenses) and those suffered by the decedent (loss of income), they were not entitled to share equally in the amount of damages awarded for loss of society and companionship; instead, each beneficiary was entitled to recover for himself any loss of society and companionship he might prove, so the court did not err by submitting a verdict form that allowed the jury to award each beneficiary separate amounts in non-economic damages. Thus the court denied the beneficiaries' motion for new trial on that ground. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 21012 (S.D. Miss. 2008).

Recovery of emotional distress damages is not permitted under the Mississippi Wrongful Death Statute and damages awards cannot be enlarged on account of the horror and terrible shock of a tragedy; as photographs of the accident scene and testimony regarding the manner in which the decedent died were not relevant to the claims of loss of society or companionship, and were otherwise highly prejudicial, the court found it did not err by excluding this evidence during the second trial in this case; thus the court denied the beneficiaries motion for new trial on this ground. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 21012 (S.D. Miss. 2008).

Court's charge given in a second trial that disclosed the amount awarded for funeral expenses and lost income in the first trial was necessary and reasonable in order to explain that the second trial was limited to the beneficiaries' claims for non-economic damages as the issues of liability and economic loss had already been decided; additionally, beneficiaries failed to show that the charge affected their substantial rights. Accordingly, the court did not err by disclosing the amount of damages awarded in the first trial in its charge to the jury during the second trial of this case an a new trial was not warranted. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 21012 (S.D. Miss. 2008).

Trial court did not err in awarding hedonic damages in a wrongful death suit arising out of a collision between the decedent's vehicle and the corporation's tractor-trailer when death was instantaneous. Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 2002 Miss. LEXIS 181 (Miss. 2002).

Trial court properly distributed insurance settlement proceeds in wrongful death action to decedent's father, mother, half-sisters and half-brother, equally, without separate hearing in which each beneficiary could attempt to prove individual damages, and therefore, right to receive larger or smaller portion of insurance proceeds, since statute required that funds "shall be equally distributed." Pannell v. Guess, 671 So. 2d 1310, 1996 Miss. LEXIS 124 (Miss. 1996).

In a wrongful death action brought by the parents of a passenger who was killed in a motor vehicle accident, the parents were entitled to receive only the uninsured motor vehicle (UM) coverage provided by their own policies and the policy covering the accident vehicle, and were not entitled to the UM coverage provided by 2 other insurance policies issued to the owners of the accident vehicle which covered 2 other automobiles; the parents were entitled to stack the UM coverage provided by the policies in which the passenger met the definition of an "insured" either under the terms of the policy and/or the UM statute, and the passenger was an "insured" only under the policy covering the accident vehicle since she was a guest passenger in that vehicle but was not a guest passenger in either of the other 2 vehicles covered under the other policies issued to the owners. State Farm Mut. Auto. Ins. Co. v. Davis, 613 So. 2d 1179, 1992 Miss. LEXIS 829 (Miss. 1992), overruled in part, Meyers v. Am. States Ins. Co., 914 So. 2d 669, 2005 Miss. LEXIS 322 (Miss. 2005).

This section does not require that jury know identity of beneficiaries, therefore court need not have informed jury that plaintiff's children would have been primary beneficiaries of any wrongful death damages it awarded; court properly rejected plaintiff's argument that jury assumed that plaintiff would be sole recipient of damages and thus the interests of the children were unfairly prejudiced. Munn v. Algee, 924 F.2d 568, 1991 U.S. App. LEXIS 3050 (5th Cir. Miss.), cert. denied, 502 U.S. 900, 112 S. Ct. 277, 116 L. Ed. 2d 229, 1991 U.S. LEXIS 4951 (U.S. 1991).

A trial court erred in declining to grant a motion for a new trial on the issue of damages in a wrongful death action where the jury had failed to return any damages for the value of the decedent's life expectancy, the decedent's pain and suffering, and the loss of the decedent's companionship and society where an expert testified that the decedent's lost net income was $70,495, the evidence was overwhelming that the decedent was alive and asking for help when he was inside the cab of a truck after the accident which caused his death, and the decedent's brother and sister testified as to the closeness of their family. Jones v. Shaffer, 573 So. 2d 740, 1990 Miss. LEXIS 893 (Miss. 1990).

In an action to recover under the uninsured motorist provisions of a decedent's policy brought by the decedent's 2 personal representatives, each representative was not entitled to recover "per person" limits under the policy since the representatives' status as insureds was due to their status as wrongful death beneficiaries under § 11-7-13, which provides a derivative action by the beneficiaries. Thus, the representatives' total recovery was limited to that amount to which the decedent would have been entitled, to be shared equally between them. Wickline v. United States Fidelity & Guaranty Co., 530 So. 2d 708, 1988 Miss. LEXIS 448 (Miss. 1988), overruled in part, Meyers v. Am. States Ins. Co., 914 So. 2d 669, 2005 Miss. LEXIS 322 (Miss. 2005).

Although automobile of tortfeasor who carries liability insurance in amount less than amount of coverage available to injured person under that person's uninsured motorist provisions of injured person's policies is "uninsured motor vehicle" by statutory definition (§ 83-11-103), uninsured motorist coverage may be reduced by offset for sums paid by another company on behalf of under-insured driver where uninsured motorist provision so provides; furthermore, although insurer's maximum liability is aggregate of all uninsured motorist policies under which injured person is covered, "per person" limitations in policies refer to injured person only, not to persons who may make claim under policy. State Farm Mut. Auto. Ins. Co. v. Eubanks, 620 F. Supp. 17, 1985 U.S. Dist. LEXIS 17700 (N.D. Miss. 1985), aff'd, 785 F.2d 1346, 1986 U.S. App. LEXIS 23704 (5th Cir. Miss. 1986).

A railroad employee leaving only a widow and minor children, a suit for damages may be brought by them only for damages for his death. Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 1907 Miss. LEXIS 213 (Miss. 1907), aff'd, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 1910 U.S. LEXIS 2076 (U.S. 1910).

23. —Elements of damages.

Survival claims described in Miss. Code Ann. § 11-7-13, the wrongful-death statute, are, by specific statutory language, limited to damages which a deceased person could have pursued if death had not ensued. Caves v. Yarbrough, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Hedonic damages are not available in a wrongful death action absent proof that the decedent survived long enough to suffer such damages. Choctaw Maid Farms, Inc. v. Hailey, 2001 Miss. LEXIS 302 (Miss. Oct. 31, 2001).

The trial judge erred in finding that the plaintiff established no right to recover for loss of society and companionship arising from the death of her 23-year-old son, even in the absence of evidence of her own life expectancy, as she should have been allowed to recover for her past loss of society and companionship in the years between her son's death and the date of trial. Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023, 2000 Miss. LEXIS 244 (Miss. 2000).

The trial judge erred in refusing to allow the plaintiff to introduce evidence of funeral expenses for her son based on the fact that she could not establish that she had paid those expenses personally; such a showing is not a prerequisite for recovering funeral expenses in a wrongful death case. Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023, 2000 Miss. LEXIS 244 (Miss. 2000).

Wrongful death action is to compensate beneficiary for loss of companionship and society of decedent, pain and suffering of decedent between time of injury and death, and punitive damages and, thus, beneficiary need only establish some of those elements in order to recover for decedent's wrongful death. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Momentary anxiety caused by anticipation of an accident does not support an award of damages for pain and suffering under the wrongful death statute. M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615, 1988 Miss. LEXIS 437 (Miss. 1988).

Under § 11-7-13, recoverable damages include the present net cash value of the life expectancy of the deceased, the loss of the companionship and society of the decedent, the pain and suffering of the decedent between the time of injury and death, and punitive damages. McGowan v. Estate of Wright, 524 So. 2d 308, 1988 Miss. LEXIS 50 (Miss. 1988).

Wrongful death statute (§ 11-7-13) does not provide for prejudgment interest on estimated earnings from time of decedent's death to time of trial. Smith v. Industrial Constructors, Inc., 783 F.2d 1249, 1986 U.S. App. LEXIS 22729 (5th Cir. Miss. 1986).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the personal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damage to real or personal property, funeral expenses and medical expenses. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by one of such persons, there can only be one suit for the benefit of all entitled to share in the distribution, and the damages recoverable in such suit are punitive damages, pain and suffering of the deceased and damages that his heirs might have suffered because of their personal relationship with the deceased, such as support and loss of companionship. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

In an action by an administratrix to recover for the wrongful death of her eight-year-old decedent, who was killed when struck by a truck, the trial court's instruction that if the jury should find for the plaintiff, they might consider as a proper element of damages the present net cash value of the life of the deceased, if any, at the time of her death, was approved. Reed v. State, 232 Miss. 432, 99 So. 2d 455, 1958 Miss. LEXIS 290 (Miss. 1958).

In an action to recover damages for death of a son, the elements which the jury may consider appear to be medical, ambulance, doctor and hospital expense paid, or incurred, by plaintiff, loss of companionship, the present net cash value of the life of deceased at the time of his death, and such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all the damages of every kind to the mother. Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191, 1956 Miss. LEXIS 437 (Miss. 1956).

In an action for wrongful death of a twenty-year-old boy in fixing the amount of the damage the jury should consider the present net cash value of the life of deceased at the time of his death. Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19, 1955 Miss. LEXIS 486 (Miss. 1955).

A husband is entitled to the services and earnings of his wife. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

Surviving husband and children are entitled to recover for loss of society and companionship in death of their wife and mother, excluding damages by way of solatium. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

In suit for death of five-year-old child brought by parents and the brothers and sisters, recovery may include value of services of child from time of death to majority, such damages as jury may fairly award as compensation for physical and mental anguish endured by such child between time of injury and death, such gratuities as parents had reasonable expectation of receiving before or after majority and whatever sum child might have recovered as present value of his own expectancy. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

Value of husband's support of wife and his association, society and companionship are proper elements of damage in death action. Standard Oil Co. v. Crane, 199 Miss. 69, 23 So. 2d 297, 1945 Miss. LEXIS 270 (Miss. 1945), overruled in part, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 1985 Miss. LEXIS 1942 (Miss. 1985).

In death action, value of decedent's life expectancy is not proper element of damages. Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677, 1931 Miss. LEXIS 173 (Miss. 1931).

In action under statute for death, proper parties may recover value of loss of decedent's companionship and society. Gulf Refining Co. v. Miller, 153 Miss. 741, 121 So. 482, 1929 Miss. LEXIS 75 (Miss. 1929).

In a suit where the claim for damages is limited to those of the decedent the net value of life expectancy cannot be recovered. Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470, 1924 Miss. LEXIS 233 (Miss. 1924).

Damages for life expectancy and for the amount decedent would have expended in the support of his children during minority and for support of his wife during her lifetime and for loss of his society, protection and companionship cannot all be recovered. New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104, 1920 Miss. LEXIS 565 (Miss. 1920); Hines v. Moore, 124 Miss. 500, 87 So. 1 (Miss. 1921).

The surviving brothers and sisters may recover damages for loss of companionship. Gulf & S. I. R. Co. v. Boone, 120 Miss. 632, 82 So. 335, 1919 Miss. LEXIS 116 (Miss. 1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415, 1920 U.S. LEXIS 1680 (U.S. 1920), writ of error dismissed, 252 U.S. 567, 40 S. Ct. 343, 64 L. Ed. 719, 1920 U.S. LEXIS 1092 (U.S. 1920).

They may also recover the present value of his life expectancy. Gulf & S. I. R. Co. v. Boone, 120 Miss. 632, 82 So. 335, 1919 Miss. LEXIS 116 (Miss. 1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415, 1920 U.S. LEXIS 1680 (U.S. 1920), writ of error dismissed, 252 U.S. 567, 40 S. Ct. 343, 64 L. Ed. 719, 1920 U.S. LEXIS 1092 (U.S. 1920).

There can be no damages for pain and suffering where death was instantaneous. Illinois C. R. Co. v. Fuller, 106 Miss. 65, 63 So. 265, 1913 Miss. LEXIS 97 (Miss. 1913).

In determining damages a jury may consider the loss of companionship, protection and society of the deceased but not solatium. St. Louis & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471, 1911 Miss. LEXIS 164 (Miss. 1911).

The value of life expectancy is an element of damages in an action by parent to recover damages for her son's death. Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735, 1909 Miss. LEXIS 241 (Miss. 1909).

Four elements of damages proper to be considered in an action by a parent to recover for the death of a minor child: (1) the value of the child's services from the time of its death until majority, (2) such damages as the jury may fairly award as compensation for the physical and mental anguish endured by the child between the time of injury and death, (3) such gratuities as the parent had a reasonable expectation of receiving before or after majority, and (4) whatever sum the child might have recovered as the present value of his own expectancy. Cumberland Tel. & Tel. Co. v. Anderson, 89 Miss. 732, 41 So. 263, 1906 Miss. LEXIS 2 (Miss. 1906).

In a suit by a parent, loss of the child's society and comfort the parent would have had in rearing him are not elements of damages. Mobile & O. R. Co. v. Watly, 69 Miss. 145, 13 So. 825, 1891 Miss. LEXIS 162 (Miss. 1891).

24. —Measure of damages.

In a personal injury products liability lawsuit, an award of damages to the decedent's estate was not inflammatory because, considering the actual damages and the testimony of the decedent's mother as to the family's loss of society and companionship of a young son and brother on the verge of manhood, and the pain and suffering that he must have experienced between the time of the tire's rupture when he was alive and when the rolling automobile stopped against a tree and he was dead, the jury's award was proper. There was evidence to support the damages, and the jury award to the estate was not based upon hedonic damages. Goodyear Tire & Rubber Co. v. Kirby, 156 So. 3d 281, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. 2009).

In death action, plaintiff may recover present value of any pecuniary advantage which evidence discloses plaintiff might reasonably have expected from continuance of decedent's life. Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677, 1931 Miss. LEXIS 173 (Miss. 1931).

The present life expectancy of a decedent should be discounted six per cent, per annum for the period it has to run and there should be taken into account the living expenses of the deceased which must be deducted in determining damages for life expectancy of deceased. Louisville & N. R. Co. v. Garnett, 129 Miss. 795, 93 So. 241, 1922 Miss. LEXIS 90 (Miss. 1922).

Recovery for services of a child would not extend beyond his minority. Davis v. McCullers, 126 Miss. 521, 89 So. 158, 1921 Miss. LEXIS 61 (Miss. 1921).

Where the employment of a minor without his mother's consent constitutes an actionable wrong, her measure of damages can be no greater than if the master were guilty of negligence in the killing of the boy. Kirkpatrick v. Ferguson-Palmer Co., 116 Miss. 874, 77 So. 803, 1917 Miss. LEXIS 364 (Miss. 1917).

25. —Amount of damages.

In a wrongful death action arising from the death of an 85-year-old man in an automobile collision, a jury verdict in the amount of $150,000 comported with the evidence and, therefore, a remittitur was not warranted where the damages awarded were not just for the wrongful death of the decedent because the decedent suffered severe pain, suffering and mental anguish for 2 months prior to death as a result of the injuries he sustained in the collision, the decedent had at least 7.3 years of life remaining according to life tables in effect at the time of his death, the plaintiff was the decedent's only child, and the plaintiff and the decedent were extremely close and communicated daily. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

Wrongful death award based on future earnings of deceased should be reduced by amount of income tax deceased would have paid on earnings. Smith v. Industrial Constructors, Inc., 783 F.2d 1249, 1986 U.S. App. LEXIS 22729 (5th Cir. Miss. 1986).

A jury verdict for $100,000 for the wrongful death of decedent who was 41 years of age, with a life expectancy of 31.29 years, who earned $200 a week, and left surviving him a widow and two young children who were dependent upon him, and the youngest of which was approximately two years old at the time of his death, was not so excessive as to indicate it was the result of passion or prejudice on the part of the jury. Oden Constr. Co. v. McPhail, 228 So. 2d 586, 1969 Miss. LEXIS 1394 (Miss. 1969).

Where deceased was, during his lifetime, a healthy, strong operator of a caterpillar tractor, skilled and earning an average wage of between $55 and $60 per week, was a good husband, and supported his wife and family, and had a life expectancy in excess of 40 additional years, and award of $4500 to his wife was inadequate. Campbell v. Schmidt, 195 So. 2d 87, 1967 Miss. LEXIS 1436 (Miss. 1967).

A jury award of $150,000 for the injuries and death of a woman 44 years old at the time of the accident, with a husband and four children, who received hyperextension injury to her neck and a trauma to her left breast which caused the metastasis of a dormant cancer from which she died three years after the accident, and who was hospitalized for 222 days, was grossly excessive, and the affirmance of the judgment against the defendant was conditioned upon the acceptance of a remittitur of $35,000. New Orleans & N. R. Co. v. Thornton, 191 So. 2d 547, 1966 Miss. LEXIS 1223 (Miss. 1966).

A verdict for $75,000 for the wrongful death of a five-year-old child, with a life expectancy of 64 years, was excessive by $35,000, and the Supreme Court would reverse the cause for new trial on issues of damages only unless plaintiffs entered a remittitur of $35,000. Bush Constr. Co. v. Walters, 250 Miss. 384, 164 So. 2d 900, 1964 Miss. LEXIS 469 (Miss. 1964).

Award of $5000, for death of man of 55, with a life expectancy of 17.78 years, who suffered excruciating pain for 3 days before his death, held grossly inadequate. City of Corinth v. Gilmore, 236 Miss. 296, 110 So. 2d 606, 1959 Miss. LEXIS 319 (Miss. 1959).

$17,500 damages for death of 67 year old mother, held not excessive. Ashcraft v. Alford, 236 Miss. 25, 109 So. 2d 343, 1959 Miss. LEXIS 289 (Miss. 1959).

A verdict in an action under this statute [Code 1942, § 1453] will not be set aside for inadequacy where its amount may be attributed to comparative negligence. Matheny v. Illinois C. R. Co., 235 Miss. 173,

108 So. 2d 589, 1959 Miss. LEXIS 415 (Miss. 1959).

An award of $3000 for the death of a 10-year-old boy killed in a highway accident was inadequate, even though that amount was probably uncollectible. Green v. Hatcher, 236 Miss. 830, 105 So. 2d 624, 1958 Miss. LEXIS 281 (Miss. 1958).

An award of $40,000 for the wrongful death of an eight-year-old child was not so excessive as to represent passion, prejudice and bias on the part of the jury. Reed v. Eubanks, 232 Miss. 27, 98 So. 2d 132, 1957 Miss. LEXIS 441 (Miss. 1957).

In determining whether the damages awarded for wrongful death are excessive, the test on review is whether the verdict is so excessive as to be the result of bias, prejudice, or passion on the part of jury. Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19, 1955 Miss. LEXIS 486 (Miss. 1955).

An award of $15,000 for the wrongful death of the decedent who had a life expectancy of thirty years and eight months was not so large as to evince passion or prejudice on the part of the jury. Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 57 So. 2d 859, 1952 Miss. LEXIS 483 (Miss. 1952).

Where the deceased at the time of his death was forty-two years of age and left surviving him his widow and two children and where he spent in the support and maintenance of his family $7,000 to $8,000 a year, a verdict of $47,000 by the jury is not so grossly excessive as to evince, bias, prejudice or passion. Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443, 1951 Miss. LEXIS 353 (Miss. 1951), overruled in part, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 1985 Miss. LEXIS 1942 (Miss. 1985).

Verdict of $25,000 in favor of husband and three adult children for wrongful death of seventy-two year old woman was held excessive by $7500. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

Supreme Court in considering size of verdicts may take notice of inflationary conditions in the country with the consequent decrease in the purchasing value of money. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

In action by parents and brothers and sisters for death of five-year-old child, verdict for $2,000 is not adequate damages. Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665, 1949 Miss. LEXIS 403 (Miss. 1949).

Verdict for $7,500.00 in action for death of child killed by truck on highway is excessive. Stevenson v. Robinson, 37 So. 2d 568 (Miss. 1948).

Verdict awarding widow $15,000 for death of husband earning $45 per week was excessive by $10,000, where the husband had deserted the wife and had refused to support her. Standard Oil Co. v. Crane, 199 Miss. 69, 23 So. 2d 297, 1945 Miss. LEXIS 270 (Miss. 1945), overruled in part, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 1985 Miss. LEXIS 1942 (Miss. 1985).

An instance of excessive verdict $10,000.00 reduced to $5,000.00. Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470, 1924 Miss. LEXIS 233 (Miss. 1924).

An instance of inadequate damages awarded. Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470, 1924 Miss. LEXIS 233 (Miss. 1924).

An instance of a verdict being grossly inadequate. Huff v. Bear Creek Mill Co., 116 Miss. 509, 77 So. 306, 1917 Miss. LEXIS 328 (Miss. 1917).

On the question of excessive verdict see Yazoo & M. V. R. Co. v. Farr, 94 Miss. 557, 48 So. 520, 1909 Miss. LEXIS 352 (Miss. 1909).

26. —Exemplary or punitive damages.

In a wrongful death action arising out of automobile collision occurring when defendant truck operator pulled out of the lane to pass a truck on a curve where he could not see an automobile approaching from the opposite direction, the question of whether the truck driver's conduct was gross or reckless negligence was a question for the jury in considering recovering of exemplary damages. Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19, 1955 Miss. LEXIS 486 (Miss. 1955).

If trespasser's death on railroad tracks resulted from engineer's failure to give warning signals after becoming aware of trespasser's danger, trespasser's administrator was entitled to have submitted to jury question of punitive damages, even if no actual damages were proved. Young v. Columbus & G. R. Co., 165 Miss. 287, 147 So. 342, 1933 Miss. LEXIS 302 (Miss. 1933).

In proper cases exemplary as well as compensatory damages may be allowed. Illinois C. R. Co. v. Fuller, 106 Miss. 65, 63 So. 265, 1913 Miss. LEXIS 97 (Miss. 1913).

Punitive damages are properly disallowed in the absence of wantonness or gross negligence. Carrier Lumber & Mfg. Co. v. Boxley, 103 Miss. 489, 60 So. 645, 1912 Miss. LEXIS 200 (Miss. 1912).

27. Compromise, settlement and release.

On a petition by a decedent's husband to pay over escrow funds, a chancery court properly held that remaining settlement proceeds in a wrongful death action were wrongful death proceeds because Mississippi courts regularly distributed the proceeds of wrongful death settlements to the wrongful death beneficiaries; an antenuptial agreement between the decedent and her husband had no bearing on the settlement of the wrongful death claim. In re Estate of Burns, 31 So. 3d 1227, 2009 Miss. App. LEXIS 482 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 176 (Miss. 2010).

Benefits payable under uninsured motorist insurance policy due to injuries resulting in death of insured need not be paid to persons designated under wrongful death statute (§ 11-7-13), but may be paid to surviving spouse in accordance with "facility of payment" clause. Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 1985 Miss. LEXIS 2195 (Miss. 1985).

Where a decedent's administrator settled a wrongful death suit against the tortfeasor without consideration of the rights of two minor children of the decedent who had been adopted by their paternal grandparents, the settlement did not bar the children from asserting their rights against the tortfeasor. Alack v. Phelps, 230 So. 2d 789, 1970 Miss. LEXIS 1562 (Miss. 1970).

A decree on an ex parte petition to settle an alleged doubtful claim for wrongful death is not res judicata in a death action brought by a next of kin. Evans v. Cheatwood, 329 F.2d 583, 1964 U.S. App. LEXIS 5932 (5th Cir. Miss. 1964).

Administrator can compromise and settle claim for death and execute valid release, where authorized by chancery court's decree. Rowe v. Fair, 157 Miss. 326, 128 So. 87, 1930 Miss. LEXIS 290 (Miss. 1930).

Settlement by administrator of claim for wrongful death properly authorized by chancery court's decree, is binding on all interested parties. Rowe v. Fair, 157 Miss. 326, 128 So. 87, 1930 Miss. LEXIS 290 (Miss. 1930).

Settlement for claim for death of 16-year-old boy for $2,000 cash and house and lot, by administrators under chancery court's decree, held not inadequate. Rowe v. Fair, 157 Miss. 326, 128 So. 87, 1930 Miss. LEXIS 290 (Miss. 1930).

Provision that determination of one suit for wrongful death shall not bar another action, unless decided on merits, does not apply where all parties interested acquiesced in settlement. Rowe v. Fair, 157 Miss. 326, 128 So. 87, 1930 Miss. LEXIS 290 (Miss. 1930).

Widow's release of railroad from liability for death of husband and property damage did not bar action by lien creditor to recover balance of purchase price of automobile destroyed. General Motors Acceptance Corp. v. New Orleans & G. N. R. Co., 156 Miss. 122, 125 So. 541, 1930 Miss. LEXIS 138 (Miss. 1930).

When the suit is brought by the widow for the death of a husband or father, she can compromise and thereby bind her children. Natchez Cotton-Mills Co. v. Mullins, 67 Miss. 672, 7 So. 542, 1890 Miss. LEXIS 125 (Miss. 1890).

28. Res judicata.

Earlier federal lawsuit by survivors of workers who were killed in propylene gas explosion against manufacturer and bulk distributor of gas, in which defendants had been granted summary judgment, operated under doctrine of res judicata to bar state court action by survivors against downstream distributors of gas; subject matter in both actions was identical, causes of action were the same even though federal suit was labeled products liability case and state action was wrongful death action based on manufacturing defect, and downstream distributors were privies of bulk distributor and were of same quality or character. Little v. V & G Welding Supply, 704 So. 2d 1336, 1997 Miss. LEXIS 782 (Miss. 1997).

29. Unborn child.

Father and his children failed to provide the Attorney General with notice of their constitutional challenge at the trial level because they notified the Attorney General of their challenge to the constitutionality of Miss. Code Ann. § 91-1-15 in their notice of appeal; thus, the father and children did not comply with the requirements of Miss. R. Civ. P. 24(d), and their challenge to the constitutionality of the wrongful death statute's incorporation of § 91-1-15(3) was procedurally barred. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Doctrine of unclean hands was inapplicable because a mother's failure to give a father notice of a wrongful death acton did not amount to a willful act that transgressed equitable standards of conduct; the mother and the father were never married, the father consistently denied paternity of the deceased child, and the father failed to meet the statutory requirements to constitute a wrongful death beneficiary of the child. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

From Miss. Code Ann. § 11-7-13 it was clear that in order for a father to be entitled to proceeds from a wrongful death action for an illegitimate child, he had to establish his right to inherit from the child under Miss. Code Ann. § 91-1-15, which included the § 91-1-15(3)(d)(i) requirements; therefore, the father's argument was without merit where the father made no effort to be a parent to the child, suffered no loss as a result of the child's demise, and any part of the settlement received by the father and his kindred could only have been termed a windfall and unjust enrichment. Williams v. Farmer, 876 So. 2d 300, 2004 Miss. LEXIS 760 (Miss. 2004).

Miss. Code Ann. § 11-7-13 includes a nonviable fetus who is "quick" in the womb (i.e, has developed so that it moves within the mother's womb) as a "person"; the cause of action dates from the death of the fetus, and the determination of whether a fetus is "quick" in the womb is assigned to the jury. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 2003 Miss. LEXIS 374 (Miss. 2003).

Where plaintiff sued defendants for causing her to miscarry while she was five months pregnant, the trial court properly denied partial summary judgment to defendants on her wrongful death claims, as (1) under Miss. Code Ann. § 11-7-13, a nonviable, unborn child who was "quick" in the womb was a "person"; and (2) whether the child was "quick" was for the jury to decide. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 2003 Miss. LEXIS 374 (Miss. 2003).

A non-viable fetus can recover for the death of a parent under the wrongful death statute. Childs v. GMC, 73 F. Supp. 2d 669, 1999 U.S. Dist. LEXIS 15757 (N.D. Miss. 1999).

Wrongful death action can be maintained for death of unborn child who reaches prenatal age of viability. Fizer v. Davis (In re Estate of Davis), 706 So. 2d 244, 1998 Miss. LEXIS 16 (Miss. 1998).

Child who at time of his brother's death was unborn fetus, at six and one-half months gestation, was "living" at that time for purposes of wrongful death statute, and thus, he was beneficiary under that statute after his birth; medical evidence showed that, at time of his brother's death, child had reached prenatal age of viability when destruction of his mother's life would not necessarily mean end of his life. Fizer v. Davis (In re Estate of Davis), 706 So. 2d 244, 1998 Miss. LEXIS 16 (Miss. 1998).

30. Adopted child.

Termination of a deceased father's parental rights to a natural son and the son's adoption in Michigan did not bar a chancery court from naming the son as the father's sole wrongful death beneficiary because, under governing Mississippi law, a natural son could nonetheless be so designated, despite contrary Michigan statutes. Alexander v. DeForest (In re Determination of Wrongful Death Heirs of Underhill), 262 So. 3d 1111, 2019 Miss. LEXIS 54 (Miss. 2019).

Finding that the half-brother of the decedent, who was adopted by another man, was entitled to a one-third share of the decedent's wrongful death settlement proceeds was proper where an adopted child had full rights to inherit from his natural family, just as if there had been no adoption; thus, the half-brother, as the natural half-brother, was a statutory heir-at-law and wrongful death beneficiary of the decedent. Estate of Yount v. McKnight, 845 So. 2d 724, 2003 Miss. App. LEXIS 427 (Miss. Ct. App. 2003).

31. Jurisdiction.

Trial court properly dismissed a daughter's wrongful death actions against a doctor and a medical center because it took jurisdiction over her first lawsuit against another physician to the exclusions of the lawsuits against the doctor and medical center, and those subsequently filed actions were of no effect; so long as the first lawsuit was pending, the subsequently filed actions for the same death were of no effect. Estate of Davis v. Blaylock, 212 So. 3d 755, 2017 Miss. LEXIS 2 (Miss. 2017).

Dismissal of a wrongful death suit against a hospital was error because, although an earlier wrongful death suit arising from the same incident had been filed against a nursing home, that suit had been dismissed by the time the motion to dismiss was addressed by the trial court, thus it was null and void, and the second suit against the hospital was the only suit pending for Miss. Code Ann. § 11-7-13 purposes. Briere v. S. Cent. Reg'l Med. Ctr., 3 So. 3d 126, 2009 Miss. LEXIS 89 (Miss. 2009).

The first court to properly take jurisdiction of a wrongful death action in Mississippi courts shall, so long as that action is pending, have exclusive jurisdiction, and any other subsequently filed action for the same death shall be of no effect. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

32. Collateral source rule.

In a wrongful death action, none of the attorneys or witnesses discussed which particular bills Medicare paid, and the hospital made no attempt to persuade the jury that payments from Medicare should have served to reduce the amount of damages awarded. Consequently, the collateral source rule did not apply; additionally, since the decedent's widow mentioned Medicare in her direct testimony and the only use of Medicare in the hospital's cross examination was to clear up the amount of lost monthly income, the trial judge did not abuse his discretion in allowing said testimony. Burr v. Miss. Baptist Med. Ctr., 909 So. 2d 721, 2005 Miss. LEXIS 385 (Miss. 2005).

RESEARCH REFERENCES

ALR.

Instruction mentioning or suggesting specific sum as damages in action for personal injury or death. 2 A.L.R.2d 454.

Contributory negligence of parent as bar to an action by parent or administrator for death of child. 2 A.L.R.2d 785.

Contributory negligence of beneficiary as affecting action under death or survival statute. 2 A.L.R.2d 785.

Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa. 6 A.L.R.2d 256.

Liability for injury to or death of participant in game or contest. 7 A.L.R.2d 704.

Marriage of child, or probability of marriage, as affecting right or measure of recovery by parents in death action. 7 A.L.R.2d 1380.

Prenatal injury as ground of action. 10 A.L.R.2d 1059, 27 A.L.R.2d 1256.

Right of defendant in action for personal injury or death to bring in joint tortfeasor for purpose of asserting right of contribution. 11 A.L.R.2d 228.

Civil liability for death by suicide. 11 A.L.R.2d 751.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 A.L.R.2d 611.

Death of or injury to occupant of airplane from collision or near collision with another aircraft. 12 A.L.R.2d 677.

Proof to establish or negative self-defense in civil action for death from intentional act. 17 A.L.R.2d 567.

Action against spouse or state for causing death of other spouse. 28 A.L.R.2d 662.

Right of action for wrongful death as subject to claims of creditors. 35 A.L.R.2d 1443.

Venue of wrongful death action. 36 A.L.R.2d 1146.

Effect of death of a beneficiary upon right of action under death statute. 43 A.L.R.2d 1291.

Effect of death of beneficiary upon right of action under death statute. 43 A.L.R.2d 1291.

Capacity of local or foreign representative to maintain death action under foreign statute providing for action by personal representative. 52 A.L.R.2d 1016.

Retroactive effect of statute changing distribution of recovery or settlement for wrongful death. 66 A.L.R.2d 1444.

Right of recovery, under wrongful death statute, for benefit of illegitimate child or children of decedent. 72 A.L.R.2d 1235.

Admissibility in wrongful death action of testimony of actuary or mathematician to establish present worth of pecuniary loss. 79 A.L.R.2d 259.

Admissibility, in death action for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, etc., of children. 79 A.L.R.2d 819.

Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 A.L.R.2d 764.

Wrongful death damages for loss of expectancy of inheritance from decedent. 91 A.L.R.2d 477.

Conflict of laws as to measure or amount of damages in death actions. 92 A.L.R.2d 1180.

Action for death of adoptive parent, by or for benefit of adopted or equitably adopted child. 94 A.L.R.2d 1237.

Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death. 95 A.L.R.2d 585.

What law governs right to contribution or indemnity between tortfeasors. 95 A.L.R.2d 1096.

Time from which statute of limitations begins to run against cause of action for wrongful death. 97 A.L.R.2d 1151.

Action for death of unborn child. 15 A.L.R.3d 992.

Rescue doctrine: applicability to situation created by breach of warranty. 44 A.L.R.3d 473.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death. 45 A.L.R.3d 345.

Liability of governmental entity or public official for personal injury or damages arising out of vehicular accident due to negligent or defective design of a highway. 45 A.L.R.3d 875.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child. 53 A.L.R.3d 566.

Modern status of rule denying a common-law recovery for wrongful death. 61 A.L.R.3d 906.

Death action by or in favor of parent against unemancipated child. 62 A.L.R.3d 1299.

Action for death of stepparent by or for benefit of stepchild. 68 A.L.R.3d 1220.

Remarriage of surviving parent as affecting action for wrongful death of child. 69 A.L.R.3d 1038.

Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death accrued before marriage. 69 A.L.R.3d 1046.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult. 74 A.L.R.3d 1171.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value on earnings decedent would have made after death. 76 A.L.R.3d 125.

Recovery for mental or emotional distress resulting from injury to, death of, member of plaintiff's family arising from physician's or hospital's wrongful conduct. 77 A.L.R.3d 447.

Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action. 77 A.L.R.3d 1175.

Right of illegitimate child, after Levy v. Louisiana, to recover under wrongful death statute for death of putative father. 78 A.L.R.3d 1230.

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent. 87 A.L.R.3d 849.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived. 91 A.L.R.3d 316.

Elements and measure of damages for breach of warranty in sale of horse. 91 A.L.R.3d 419.

Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state. 92 A.L.R.3d 797.

Validity of release of prospective right to wrongful death action. 92 A.L.R.3d 1232.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa. 94 A.L.R.3d 676.

Effect of death of beneficiary upon right of action under death statute. 13 A.L.R.4th 1060.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 A.L.R.4th 589.

Judgment in favor of, or adverse to, person injured as barring action for his death. 26 A.L.R.4th 1264.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 A.L.R.4th 987.

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 A.L.R.4th 1188.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker. 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations. 47 A.L.R.4th 134.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons. 48 A.L.R.4th 229.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor. 49 A.L.R.4th 1076.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations. 50 A.L.R.4th 787.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death. 54 A.L.R.4th 362.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent. 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse. 61 A.L.R.4th 309.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child. 61 A.L.R.4th 413.

Effect of death of beneficiary, following wrongful death, upon damages. 73 A.L.R.4th 441.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Recovery of damages for loss of consortium resulting from death of child-modern status. 77 A.L.R.4th 411.

Products liability: cigarettes and other tobacco products. 36 A.L.R.5th 541.

Wrongful death damages for loss of expectancy of inheritance from decedent. 42 A.L.R.5th 465.

Failure to use or misuse of automobile child safety seat or restraint system as affecting recovery for personal injury or death. 46 A.L.R.5th 557.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 A.L.R.5th 801.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage. 49 A.L.R.5th 659.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

The government-contractor defense to state products-liability claims. 53 A.L.R.5th 535.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death or patron. 54 A.L.R.5th 513.

Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child. 70 A.L.R.5th 461.

Skier's liability for injuries to or death of another person. 75 A.L.R.5th 583.

Who, Other Than Parent, May Recover For Loss of Consortium on Death of Minor Child. 84 A.L.R.5th 687.

Propriety of considering future income taxes in awarding damages under Federal Tort Claims Act. 47 A.L.R. Fed. 735.

Am. Jur.

22A Am. Jur. 2d, Death §§ 116- 122, 126- 135, 181- 191.

7 Am. Jur. Pl & Pr Forms (Rev), Compromise and Settlement, Forms 31 et seq. (compromise and settlement of wrongful death actions).

8 Am. Jur. Pl & Pr Forms (Rev), Death, Forms 1 et seq. (actions for wrongful death in general); 41 et seq. (availability of damages under wrongful death statute); 61 et seq. (parties entitled to bring action).

8 Am. Jur. Pl & Pr Forms (Rev), Death, Form 8.2 (Complaint, petition, or declaration – Under combined wrongful death and survival statute – Death while in police custody).

8 Am. Jur. Pl & Pr Forms (Rev), Death, Form 9.1 (Complaint under wrongful death statute – Action against municipality – Fatal shooting during execution of search warrant).

8 Am. Jur. Pl & Pr Forms (Rev), Death, Forms 1-18, 51-83 (Actions for wrongful death).

18A Am. Jur. Pl & Pr Forms (Rev), Negligence, Form 149.2 (Complaint, petition, or declaration – By family of decedent – Against owner of building where fatal shooting occurred).

19A Am. Jur. Pl & Pr Forms (Rev), Penal and Correctional Institutions, Form 5.1 (Complaint, petition, or declaration – Against municipal corporation – Failure to prevent suicide of jail inmate – Survival and wrongful death action).

5 Am. Jur. Legal Forms 2d, Compromise and Settlement § 63:71 (wrongful death).

11 Am. Jur. Trials, Representation of Survivors in Death Actions.

12 Am. Jur. Trials, Wrongful Death Actions.

20 Am. Jur. Trials, damages for wrongful death of, or injury to, child, §§ 1 et seq.

28 Am. Jur. Trials, 307 Wrongful Death of Minor in Police Custody.

37 Am. Jur. Trials 1, Crib Death Litigation.

24 Am. Jur. Proof of Facts 2d 211, Wrongful Death Damages – Loss of Prospective Inheritance.

27 Am. Jur. Proof of Facts 2d 393, Loss of Consortium in Parent-Child Relationship.

38 Am. Jur. Proof of Facts 2d 195, Forensic Economics – Period of Economic Loss in Death and Personal Injury Cases.

49 Am. Jur. Proof of Facts 2d 191, Damages for Wrongful Death of Child.

24 Am. Jur. Proof of Facts 3d 337, Proof of Damages for Decedent's Pain and Suffering.

25 Am. Jur. Proof of Facts 3d 251, Proof of Damages in Wrongful Death or Survival Action.

CJS.

25A C.J.S., Death §§ 135–199, 211-218, 219, 220, 273-308.

Law Reviews.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part I. 16 Miss. C. L. Rev. 393, Spring, 1996.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, Spring, 1997.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties – Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March 1982.

Damages Recoverable in Mississippi for the Wrongful Death of an Adult. 53 Miss. L. J. 637, December, 1983.

1983 Mississippi Supreme Court Review: Inapplicability of savings statute to wrongful death actions. 54 Miss. L. J. 169, March, 1984.

Brady, Hedonic damages. 59 Miss. L. J. 495, Fall 1989.

Hedonic Damages: A Variation in Paths, The Questionable Expert and a Recommendation for Clarity in Mississippi. 65 Miss. L. J. 735, Spring 1996.

Sleeping Double in a Single Bed – Personal Consumption in Wrongful Death, 25 Miss. C. L. Rev. 159, Spring, 2006.

Comment: "I'm Not Dead Yet!": An Analysis of the Recent Supreme Court of Mississippi's Wrongful Death Jurisprudence, 27 Miss. C. L. Rev. 235, 2007/2008.

§ 11-7-15. Contributory negligence no bar to recovery of damages; jury may reduce damages.

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

HISTORY: Codes, Hemingway's 1917, § 502; 1930, § 511; 1942, § 1454; Laws, 1910, ch. 135; Laws, 1920, ch. 312.

Cross References — Liability of railroad company for negligence and mismanagement, see § 77-9-435.

Exemption of personal injury judgment from execution for debt, see § 85-3-3 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction and application, generally.
3. Contributory negligence in general.
4. Pleading and proof.
5. Effect of negligence of defendant.
6. Extent of recovery.
7. Evidence.
8. Questions for jury.
9. Instructions.
10. — Peremptory instruction.
11. Damages.
12. —Amount of damages.

1. In general.

The "open and obvious" defense to negligence actions would be abolished, and damages would be determined through application of the true comparative negligence doctrine; thus, a trial judge erred in construing the open and obvious defense as a complete bar to the recovery of damages, since it should only be used to mitigate damages on a comparative negligence basis under § 11-7-15. Tharp v. Bunge Corp., 641 So. 2d 20, 1994 Miss. LEXIS 358 (Miss. 1994).

Under the comparative negligence doctrine, negligence is measured in terms of a percentage, and any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is sought; where negligence by both parties is concurrent and contributes to the injury, recovery is not barred, but the plaintiff's damages are diminished proportionately, and therefore a plaintiff, though negligent, may still recover from a defendant whose negligence contributed to his or her injuries. Burton v. Barnett, 615 So. 2d 580, 1993 Miss. LEXIS 90 (Miss. 1993).

A court should not, by its decree, fail to give effect to the statute. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

A common-law rule as to contributory negligence may be modified or abolished by statute. Hines v. McCullers, 121 Miss. 666, 83 So. 734, 1920 Miss. LEXIS 112 (Miss. 1920).

This statute [Code 1942, § 1454] is not unconstitutional. Natchez & S. R. Co. v. Crawford, 99 Miss. 697, 55 So. 596, 1911 Miss. LEXIS 240 (Miss. 1911).

2. Construction and application, generally.

In order to recover damages under this statute, a plaintiff would first have to prove by a preponderance of the evidence that a defendant's negligent conduct was both the cause-in-fact and the proximate cause of the resulting injuries, and in this case, plaintiffs failed to meet this burden of proof; the law is neither manifestly wrong nor mischievous and the Mississippi Supreme Court declines to overturn Mississippi's longstanding causation standard. Norman v. Anderson Reg'l Med. Ctr., 262 So. 3d 520, 2019 Miss. LEXIS 40 (Miss. 2019).

Comparative-negligence analysis was not necessary because appellant was the sole proximate cause of his electrocution, and assuming that a defendant in the underlying suit was negligent in the design or construction of the runway lighting system, that alleged negligence was not a cause in fact of his electrocution. McDaniel v. Ferrell, 232 So. 3d 814, 2017 Miss. App. LEXIS 646 (Miss. Ct. App. 2017).

In a negligence case, an owner's motion for a new trial under Miss. R. Civ. P. 59 should have been granted because the evidence showed the owner did not exercise substantial control over a worksite, despite having control over safety and specifying a daily or hourly rate; moreover, it was undisputed that the injured party's actions were negligent for comparative negligence purposes. Coho Res., Inc. v. Chapman, 913 So. 2d 899, 2005 Miss. LEXIS 266 (Miss. 2005).

Comparative negligence is applicable to an action sounding in strict liability. Pickering v. Industria Masina I Traktora, 740 So. 2d 836, 1999 Miss. LEXIS 175 (Miss. 1999).

From the points of view of both civil justice and economic efficiency, comparative negligence, as an approach to the effect that ought to be given a plaintiff's contributory fault, is demonstrably superior to the traditional common law contributory negligence bar. Thus, although Tennessee law controlled several other liability issues in a wrongful death action, the effect of the decedent's negligence, if any, would be governed by § 11-7-15 to the exclusion of the Tennessee contributory negligence rule. McDaniel v. Ritter, 556 So. 2d 303, 1989 Miss. LEXIS 501 (Miss. 1989).

In a wrongful death action brought by a minor decedent's parents, defendant was not entitled to contribution from the child's father, even though he was a joint tortfeasor, where the child could not have sued his father for damages had death not ensued; further, a diminution of damages was available only when the injured party, not a statutory beneficiary, had been contributorily negligent. Hood v. Dealers Transport Co., 472 F. Supp. 250, 1979 U.S. Dist. LEXIS 12939 (N.D. Miss. 1979).

In an action arising out of a train/car collision at a railroad crossing, a finding that the train crew had a "better chance" to avoid the collision did not preclude consideration of plaintiff's contributory negligence in failing to stop at a stop sign which should have been visible to him. Newman v. Missouri P. R. Co., 421 F. Supp. 488, 1976 U.S. Dist. LEXIS 12706 (S.D. Miss. 1976), aff'd in part and rev'd in part, 545 F.2d 439, 1977 U.S. App. LEXIS 10550 (5th Cir. Miss. 1977).

Code 1942, § 1454, has no application where the negligence of the injured person is the sole proximate cause of the injury, or where the sole proximate cause of the accident is the defendant's negligence. Salster v. Singer Sewing Machine Co., 361 F. Supp. 1056, 1973 U.S. Dist. LEXIS 12810 (N.D. Miss. 1973).

Settlement by the railroad company of an action for damages brought by the estate of the driver of a petroleum tank truck, killed as the result of a railroad crossing collision, was no more and no less than a non-litigated, court-approved compromise effectuated to avoid the risk of litigation and did not establish, conclusively or otherwise, that the negligence of the railroad far exceeded that of the truck driver so as to collaterally estop the railroad from collecting property damages from the driver's principals. Standard Oil Co. v. Illinois C. R. Co., 421 F.2d 201, 1969 U.S. App. LEXIS 9590 (5th Cir. Miss. 1969).

Although the question of contributory negligence was not involved in an action for the wrongful death of a passenger in an automobile, it was an issue in a subsequent case arising from the same collision brought for the wrongful death of the driver of the automobile in which the passenger was riding. Bush Constr. Co. v. Walters, 254 Miss. 266, 179 So. 2d 188, 1965 Miss. LEXIS 946 (Miss. 1965).

The fact that the defendant railraod had previously recovered in federal court a judgment for damage sustained by its locomotive as a consequence of a collision with a truck driven by the plaintiff is no bar, under this section [Code 1942, § 1454], to plaintiff's recovery of a judgment for the personal injuries he sustained in the accident. New Orleans & N. R. Co. v. Gable, 252 Miss. 605, 172 So. 2d 421, 1965 Miss. LEXIS 1132 (Miss. 1965).

Motion to correct judgment. Mississippi Power & Light Co. v. Walters, 248 Miss. 206, 158 So. 2d 2, 1963 Miss. LEXIS 392, 1964 Miss. LEXIS 266 (Miss. 1963).

This provision [Code 1942, § 1454] includes the question of proximate cause as well as negligence. Massengale v. Taylor, 246 Miss. 521, 150 So. 2d 859, 1963 Miss. LEXIS 473 (Miss. 1963).

Plaintiff's voluntary intoxication having contributed to accidental fall down dangerous steps. Fournier v. United States, 220 F. Supp. 752, 1963 U.S. Dist. LEXIS 7401 (S.D. Miss. 1963).

The comparative negligence statutes does not apply where the only negligence shown is that of plaintiff. Camurati v. Sutton, 48 Tenn. App. 54, 342 S.W.2d 732, 1960 Tenn. App. LEXIS 107 (Tenn. Ct. App. 1960).

The right to take comparative negligence into account may justify an otherwise inadequate verdict. Matheny v. Illinois C. R. Co., 235 Miss. 173, 108 So. 2d 589, 1959 Miss. LEXIS 415 (Miss. 1959).

This section [Code 1942, § 1454] is not in conflict with the statute which provides that where each party is found to have a claim against the other, verdict shall be rendered for the excess. Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194, 1959 Miss. LEXIS 559 (Miss. 1959).

Under this section [Code 1942, § 1454] and Code 1942, § 1456 abolishing doctrine of assumption of risk, when negligence once has been shown on part of master followed by injury to servant, the only way master can entirely escape liability is to show his negligence was not a proximate cause of the injury or that the servant's own negligence, or negligence of fellow-servant, was the sole proximate cause of the plaintiff's injury. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

The doctrine of assumption of risk, not that of contributory negligence, was applicable where the deceased rode in the front seat with the drunken driver of a truck, which he knew was not equipped to haul passengers, without objection or effort to leave the truck. Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646, 1947 Miss. LEXIS 451 (Miss. 1947).

When the proximate cause of employee's injuries is the failure of the employee to use an instrumentality in the normal or proper way, such failure goes to the entire cause of action, and not to a mere diminution of damages. Stewart v. Kroger Grocery, etc. Co., 198 Miss. 371, 21 So. 2d 912, 1945 Miss. LEXIS 207 (Miss. 1945).

This statute [Code 1942, § 1454], when invoked, does not leave it to the option of court or jury to disregard or absolve contributory negligence when shown, but the duty of the jury in such cases is made mandatory. Moore v. Abdalla, 197 Miss. 125, 19 So. 2d 502, 1944 Miss. LEXIS 281 (Miss. 1944).

Where defendant's driver was grossly negligent in entering intersection at 50 miles per hour without stopping, and collided with plaintiff's driver who, in entering the intersection on a through street at unabated speed of 30 miles per hour, was prima facie negligent, the negligence of plaintiff's driver was a contributing factor to the accident and warranted application of the comparative negligence statute.

Moore v. Abdalla, 197 Miss. 125, 19 So. 2d 502, 1944 Miss. LEXIS 281 (Miss. 1944).

Code 1930, §§ 511 and 512, Code 1942, §§ 1454 and 1455, abolished contributory negligence as a defense and makes negligence and contributory negligence questions for the jury to determine. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

This section [Code 1942, § 1454] is not applicable to a depositor's action against the bank for damage to credit and reputation resulting from improper dishonoring of checks. Weaver v. Grenada Bank, 180 Miss. 876, 179 So. 564, 1938 Miss. LEXIS 47 (Miss. 1938).

This statute [Code 1942, § 1454] is part of the substantive law of Mississippi and must be followed by the Federal Court sitting in that state. Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928, 1934 U.S. App. LEXIS 5027 (5th Cir. Miss. 1934); Railway Exp. Agency v. Mallory, 168 F.2d 426, 1948 U.S. App. LEXIS 2064 (5th Cir. Miss.), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378, 1948 U.S. LEXIS 1803 (U.S. 1948).

This statute [Code 1942, § 1454] does not deal with degrees of contributory negligence, but merely with contributory negligence of every character. Yazoo & M. V. R. Co. v. Carroll, 103 Miss. 830, 60 So. 1013, 1912 Miss. LEXIS 238 (Miss. 1912); Mississippi C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838, 1914 Miss. LEXIS 36 (Miss. 1914).

Common-law rule that master is not liable to servant for defects in simple tools held not changed by this section [Code 1942, § 1454]. Middleton v. National Box Co., 38 F.2d 89, 1930 U.S. Dist. LEXIS 1837 (D. Miss. 1930); Jones v. Southern United Ice Co., 167 Miss. 886, 150 So. 652, 1933 Miss. LEXIS 155 (Miss. 1933).

In an action for the death of a bus passenger resulting from a collision between the bus and a train, negligence of the bus driver could not be imputed to the passenger. Gulf & S. I. R. Co. v. Carlson, 137 Miss. 613, 102 So. 168, 1924 Miss. LEXIS 210 (Miss. 1924).

This statute [Code 1942, § 1454] does not repeal other statutes regulating the conduct of a railroad company. Mobile & O. R. Co. v. Campbell, 114 Miss. 803, 75 So. 554, 1917 Miss. LEXIS 87 (Miss. 1917).

This statute [Code 1942, § 1454] does not deal with degrees of contributory negligence, but merely with contributory negligence of every character. Yazoo & M. V. R. Co. v. Carroll, 103 Miss. 830, 60 So. 1013, 1912 Miss. LEXIS 238 (Miss. 1912); Mississippi C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838, 1914 Miss. LEXIS 36 (Miss. 1914).

3. Contributory negligence in general.

Trial court properly granted a limited liability company (LLC) summary judgment in wrongful death beneficiaries' action because the LLC could act only through a pilot since he was its sole member, and the beneficiaries were barred from recovering for the pilot's negligence; if the pilot had survived the crash, he would have been unable to recover from the LLC for his own negligence, and the beneficiaries stood in the pilot's shoes and also could not recover for his negligence. Howarth v. M&H Ventures, LLC, 237 So. 3d 107, 2017 Miss. LEXIS 429 (Miss. 2017).

Trial court erred in granting private contractors summary judgment on the basis that a widow's wrongful death claim would require it to question military decisions because they failed to show that adjudication of a ballistic wall's failure would implicate a political question; the contractors did not show that they would put forward a viable contributory negligence defense because the claim that the wall failed could stand without implicating a decision committed to the military's discretion. Ghane v. Mid-South Inst. of Self Def. Shooting, Inc., 137 So. 3d 212, 2014 Miss. LEXIS 32 (Miss.), cert. denied, — U.S. —, 135 S. Ct. 108, 190 L. Ed. 2d 41, 2014 U.S. LEXIS 5713 (U.S. 2014).

Motel guests who sustained damages as victims of an armed robbery at the motel did not have a duty to mitigate their damages by abiding by the robbers' demands and, therefore, the trial court did not abuse its discretion in denying the motel owners' request for a comparative negligence jury instruction. Intown Lessee Assocs., LLC v. Howard, 67 So. 3d 711, 2011 Miss. LEXIS 336 (Miss. 2011).

Where an injured motorist, who was experiencing chest discomfort, pulled his vehicle partly off the highway, but partly obstructed the right-hand lane of travel in violation of Miss. Code Ann. § 63-3-903, the motorist's act was a proximate and contributing cause an accident, and the trial court did not err by allowing the jury to apportion fault. Meka v. Grant Plumbing & Air Conditioning Co., 67 So. 3d 18, 2011 Miss. App. LEXIS 402 (Miss. Ct. App. 2011).

Mississippi law does not require apportionment of fault, Miss. Code. Ann. § 85-5-7(1), (7), to a plaintiff absent evidence sufficient to show, at least, negligence on the plaintiff's part, Miss. Code. Ann. § 11-7-15. Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475, 2008 U.S. App. LEXIS 19168 (5th Cir. Miss. 2008).

Summary judgment in favor of a landlord was proper because under Miss. Code Ann. § 11-7-15, the tenant's familiarity with the condition of the slick surface of the carport which caused her to fall and break her ankle constituted contributory negligence, and the landlord could not be contributorily negligent for a condition of which he was unaware. Dulin v. Sowell, 919 So. 2d 1010, 2005 Miss. App. LEXIS 464 (Miss. Ct. App. 2005).

In an action to recover for injuries sustained on a construction site, even if the plaintiff was contributorily negligent in attempting to walk across a dark basement, that would not bar recovery under the comparative negligence statute if the defendant also failed in its obligations to someone in the plaintiff's status. Jackson v. W. G. Yates & Sons Constr. Co., 1998 Miss. App. LEXIS 827 (Miss. Ct. App. Oct. 13, 1998).

A minor child between the ages of 7 and 14 years is prima facie presumed not to be possessed of sufficient discretion to make him or her guilty of contributory negligence, and thus the defendant who raises the defense of contributory negligence has a greater burden to prove the defense than in a case where the plaintiff is not a minor child. Glorioso v. YMCA, 556 So. 2d 293, 1989 Miss. LEXIS 18 (Miss. 1989).

A loss of consortium action is derivative, and contributory negligence applies, because the action lies on account of injuries to the other spouse. Thus, an award to a wife for loss of consortium should have been reduced by the contributory negligence of her husband. Choctaw, Inc. v. Wichner, 521 So. 2d 878, 1988 Miss. LEXIS 120 (Miss. 1988).

Contributory negligence of plaintiffs' decedent, if any, would only diminish the amount of damages to be awarded plaintiffs. Norris v. Board of Trustees, 300 So. 2d 913, 1974 Miss. LEXIS 1647 (Miss. 1974).

Where assumption of risk overlaps and coincides with contributory negligence the rules of the defense of contributory negligence shall apply. Braswell v. Economy Supply Co., 281 So. 2d 669, 1973 Miss. LEXIS 1498 (Miss. 1973).

Where two Mississippi motorists were killed in an automobile collision which occurred in Louisiana, their estates were being administered in Mississippi, and their administratrices had respectively filed in a Mississippi court an action and counterclaim for damages as a consequence of the deaths of the decedents, the issues of liability under both the declaration and counterclaim should have been submitted to the jury by appropriate instructions under the Mississippi comparative negligence statute, despite the fact that the law of Louisiana, where the fatal collision occurred, barred a recovery where contributory negligence is established. Mitchell v. Craft, 211 So. 2d 509, 1968 Miss. LEXIS 1266 (Miss. 1968).

Where the court properly instructed the jury in accord with the Mississippi statute of comparative negligence, it must be assumed that the jury considered the effect of any contributory negligence in reaching the amount of its verdict. Bill Hunter Truck Lines, Inc. v. Jernigan, 384 F.2d 361, 1967 U.S. App. LEXIS 4789 (5th Cir. Miss. 1967).

Code 1942, § 8215 should be construed in a practical manner, and it does not mean that a motorist forced to stop momentarily upon the paved portion of a highway because the vehicle in front of him stopped and oncoming traffic prevented him from passing is guilty of negligence in not immediately driving from the highway onto the shoulder. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

In view of this statute, contributory negligence does not absolutely bar recovery of damages. Arnold Services, Inc. v. Delta Motor Lines, Inc., 325 F.2d 860, 1963 U.S. App. LEXIS 3327 (5th Cir. Miss. 1963).

Where the negligence of the railroad and plaintiffs' decedent were concurring causes, each being a proximate cause of the accident, the negligence of plaintiffs' decedent did not bar recovery, but only served to diminish the damages of his next of kin. Illinois C. R. Co. v. Williams, 242 Miss. 586, 135 So. 2d 831, 1961 Miss. LEXIS 595 (Miss. 1961).

Although contributory negligence is a ground for reduction of damages, it will not bar recovery. Illinois C. R. Co. v. Farris, 259 F.2d 445, 1958 U.S. App. LEXIS 4753 (5th Cir. Miss. 1958).

That driver of pulpwood truck, in which plaintiff was riding, was violating Code 1942, § 8181, by having a portion of the truck on the left side of the highway at the time of colliding with a pickup truck which was coming out of a driveway, would under the comparative negligence statute only constitute contributory negligence which would cause damages to be reduced, and a mere violation of the law in the operation of a motor vehicle would not entitle the opposite party to a peremptory instruction. Winfield v. Magee, 232 Miss. 57, 98 So. 2d 130, 1957 Miss. LEXIS 443 (Miss. 1957).

It is well settled that a child between the ages of 7 and 14 years is prima facie presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence in failing to exercise due care for his own safety. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

Even if the farm equipment mechanic had been guilty of contributory negligence, still if the owner had failed to warn the mechanic of the dangerous condition of the owner's cotton picker, about which owner knew or should have known, prior to the mechanic's beginning work thereon, and the mechanic sustained injury while working on the machine, a jury issue was presented in an action by the mechanic against the owner. Cole v. Tullos, 228 Miss. 815, 90 So. 2d 32, 1956 Miss. LEXIS 569 (Miss. 1956).

In an action for personal injuries where the plaintiff's car ran into defendant's truck parked on the highway the court did not err in refusing to give an instruction to the defendant that the plaintiff, as a matter of law, was guilty of contributory negligence, as the instruction was not based upon the contributory negligence statute. Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578, 1951 Miss. LEXIS 309 (Miss. 1951).

Master is liable to servant when servant is injured in carrying out negligent order of foreman when danger is not so imminent that no person of ordinary prudence would have encountered it, even under orders, and there is no assumption of risk by servant where master is negligent, and contributory negligence is not bar to a recovery, such negligence being only for proper consideration in mitigation of damages. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

Contributory negligence is not a defense to action based on fraud. Reed v. Charping, 207 Miss. 1, 41 So. 2d 11, 1949 Miss. LEXIS 312 (Miss. 1949).

Municipality's duty to keep the streets in a reasonably safe condition for use by persons exercising reasonable care and caution for their own safety does not imply that contributory negligence of an injured person would bar recovery, for such implication would be in violation of this section [Code 1942, § 1454]. Owens v. Booneville, 206 Miss. 345, 40 So. 2d 158, 1949 Miss. LEXIS 266 (Miss. 1949).

An action in this state by a passenger against a foreign corporation, operating a motor transportation line in this state, to recover for injury sustained in Louisiana, would not be enjoined on the ground that contributory negligence is a complete defense in Louisiana and only a pro tanto defense in this state, since the courts of this state will apply the substantive law of Louisiana, including that of contributory negligence, in the trial of the case in this state. Tri-State Transit Co. v. Mondy, 194

Miss. 714, 12 So. 2d 920, 1943 Miss. LEXIS 85 (Miss. 1943).

The fact that the negligence of the plaintiff in a negligence action against a municipality contributed to the accident would not wholly bar him from recovery under this section [Code 1942, § 1454]. Birdsong v. Clarksdale, 191 Miss. 532, 3 So. 2d 827, 1941 Miss. LEXIS 169 (Miss. 1941).

Under this statute [Code 1942, § 1454] contributory negligence is not an absolute defense. C. C. Moore Constr. Co. v. Hayes, 119 F.2d 742, 1941 U.S. App. LEXIS 3825 (5th Cir. Miss.), cert. denied, 314 U.S. 642, 62 S. Ct. 82, 86 L. Ed. 515, 1941 U.S. LEXIS 445 (U.S. 1941).

Under this statute [Code 1942, § 1454] contributory negligence is not a defense to suits by employees. Montgomery Ward & Co. v. Lindsey, 104 F.2d 882, 1939 U.S. App. LEXIS 4249 (5th Cir. Miss. 1939).

Contributory negligence will not bar recovery, irrespective of degree. Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285, 1938 Miss. LEXIS 97 (Miss. 1938).

Under this provision [Code 1942, § 1454] contributory negligence is not a total defense. Southern Kraft Corp. v. Parnell, 65 F.2d 785, 1933 U.S. App. LEXIS 3157 (5th Cir. Miss. 1933).

Damages on account of unsafe place to work are permissible notwithstanding contributory negligence. Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857, 1917 Miss. LEXIS 164 (Miss. 1917).

Circumstance under which a minor is not guilty of contributory negligence. Walker Bros. v. Nix, 115 Miss. 199, 76 So. 143, 1917 Miss. LEXIS 199 (Miss. 1917).

Trial court properly granted a limited liability company (LLC) summary judgment in wrongful death beneficiaries' action because the LLC could act only through a pilot since he was its sole member, and the beneficiaries were barred from recovering for the pilot's negligence; if the pilot had survived the crash, he would have been unable to recover from the LLC for his own negligence, and the beneficiaries stood in the pilot's shoes and also could not recover for his negligence. Howarth v. M&H Ventures, LLC, 237 So. 3d 107, 2017 Miss. LEXIS 429 (Miss. 2017).

4. Pleading and proof.

One not pleading contributory negligence is not entitled to an instruction thereon, though the proof shows contributory negligence sufficiently for consideration by the jury. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

Contributory negligence of the person injured or killed is an affirmative defense which must be pleaded and proved, and if a defendant wishes to have a jury instructed with reference thereto, he should request such an instruction. Jefferson v. Pinson, 219 Miss. 427, 69 So. 2d 234, 1954 Miss. LEXIS 350 (Miss. 1954).

Under Mississippi law a defendant may not have the advantage of this section [Code 1942, § 1454] unless he pleads contributory negligence and requests an instruction on comparative negligence and diminution of damages. Railway Exp. Agency v. Mallory, 168 F.2d 426, 1948 U.S. App. LEXIS 2064 (5th Cir. Miss.), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378, 1948 U.S. LEXIS 1803 (U.S. 1948).

A defendant neither pleading nor requesting instruction as to contributory negligence cannot rely on contributory negligence as a defense on appeal. Gulf & S. I. R. Co. v. Saucier, 139 Miss. 497, 104 So. 180, 1925 Miss. LEXIS 162 (Miss. 1925).

A defense of contributory negligence must be specially pleaded and the burden of proving same is on the defendant. Yazoo & M. V. R. Co. v. Lucken, 137 Miss. 572, 102 So. 393, 1925 Miss. LEXIS 5 (Miss. 1925); Mobile & O. R. Co. v. Campbell, 114 Miss. 803, 75 So. 554, 1917 Miss. LEXIS 87 (Miss. 1917).

5. Effect of negligence of defendant.

Plaintiff may still recover from defendant whose negligence proximately caused or contributed to plaintiff's injury even though plaintiff was himself negligent. Blackmon v. Payne, 510 So. 2d 483, 1987 Miss. LEXIS 2522 (Miss. 1987).

Although a plaintiff may be guilty of negligence he may still recover from a defendant who is guilty of negligence which proximately caused or contributed to plaintiff's injury, but such recovery may not be had where plaintiff's negligence is the sale proximate cause of the injury. Evans v. Journeay, 488 So. 2d 797, 1986 Miss. LEXIS 2463 (Miss. 1986).

A defendant in an automobile collision case would not be absolved from liability altogether, if both parties were negligent equally, but plaintiff's damages would be reduced by 50 percent. First Nat'l Bank v. Mississippi State Highway Com., 227 So. 2d 118, 1969 Miss. LEXIS 1336 (Miss. 1969).

Gross negligence of plaintiff in jumping from train while it was running at rate of speed which he judged to be fifteen miles per hour instead of remaining on train until carried to next station is not bar to recovery of damages for injuries sustained, if negligence of defendant railroad, or its violation of duty owed to him in starting train before he had reasonable time to get off, was continuing as a contributing cause of his jumping off moving train and sustaining such injuries. McClellan v. Illinois C. R. Co., 204 Miss. 432, 37 So. 2d 738, 1948 Miss. LEXIS 379 (Miss. 1948).

A verdict should have been directed against the driver of an automobile, the windshield of which was covered with snow except for a small place which provided only vision straight ahead, who stopped before going onto a highway and then proceeded to run into a vehicle traveling the highway after the other driver had sounded his horn within 300 feet of the intersection upon seeing the stopped car. Trewolla v. Garrett, 200 Miss. 563, 27 So. 2d 887, 1946 Miss. LEXIS 323 (Miss. 1946).

This statute [Code 1942, § 1454] had no application to sustain recovery against a railroad for the death of a truck driver resulting from the collision of his truck with an unlighted railroad car standing on the railroad crossing where the negligence of the driver was the sole proximate cause of his death. Mississippi E. R. Co. v. Summers, 194 Miss. 179, 11 So. 2d 429, 1943 Miss. LEXIS 21 (Miss. 1943).

Conduct of plaintiff's gin foreman in failing to extinguish grass fire adjacent to plaintiff's premises, which had been started on railroad premises and negligently left without complete extinguishment by railroad employees, constituted contributory negligence which would not bar recovery by the owner of the gin premises for destruction of the gin in view of this section [Code 1942, § 1454]. Yazoo & M. V. R. Co. v. Fields, 188 Miss. 725, 195 So. 489, 1940 Miss. LEXIS 56 (Miss. 1940).

Under this section [Code 1942, § 1454] contributory negligence does not bar the right to recover if negligence chargeable against the defendant also proximately contributed thereto. T. A. Pittman, Inc. v. La Fontaine, 68 F.2d 469, 1934 U.S. App. LEXIS 4883 (5th Cir. Miss. 1934).

Notwithstanding the statute requiring auto drivers in approaching a crossing to stop, a driver or person who fails to observe this law is not precluded from recovering damages where negligence of the R. Co. is the proximate cause of the damage. Gulf & S. I. R. Co. v. Saucier, 139 Miss. 497, 104 So. 180, 1925 Miss. LEXIS 162 (Miss. 1925).

Negligence of the plaintiff in driving upon a railroad track which contributed to his injury will not bar his recovery where the negligence of the defendant railroad company was a proximate cause of the injury. Davis v. Elzey, 126 Miss. 789, 89 So. 666 (1921).

Contributory negligence is no bar where defendant contributed to the injury. Tallahala Lumber Co. v. Holliman, 125 Miss. 308, 87 So. 661, 1921 Miss. LEXIS 125 (Miss. 1921).

Where injury to employee was due solely to an obvious hazard incident to the employment, employer was not liable and there could be no recovery. Crossett Lumber Co. v. Land, 121 Miss. 834, 84 So. 15, 1920 Miss. LEXIS 125 (Miss. 1920).

However, where there is no negligence shown by the defendant and contributory negligence is the sole cause of the injury, there can be no recovery. Ragland v. Native Lumber Co., 117 Miss. 602, 78 So. 542, 1918 Miss. LEXIS 202 (Miss. 1918).

Fact that plaintiff was negligent in fighting a grass fire, set out wrongfully by the railroad company, does not exonerate the company from liability. Illinois C. R. Co. v. Thomas, 109 Miss. 536, 68 So. 773, 1915 Miss. LEXIS 191 (Miss. 1915).

Where the killing occurred within the corporate limits of a city and the proximate cause was the speed of train exceeding six miles per hour, the defendant is responsible for at least part of the damages. Illinois C. R. Co. v. Handy, 108 Miss. 421, 66 So. 783, 1914 Miss. LEXIS 210 (Miss. 1914).

6. Extent of recovery.

A jury has the duty and prerogative to make a decision as to contributory negligence and to reduce the award of damages, if any, in accordance with any contributory negligence. City of Jackson v. Copeland, 490 So. 2d 834, 1986 Miss. LEXIS 2483 (Miss. 1986).

Plaintiff, who sustained permanent injuries in diving into extremely shallow water from a negligently maintained municipal pier, was guilty of contributory negligence in not first determining the depth of the water, and the jury should have diminished his damages in proportion of the amount that his negligence contributed to the total negligence. Dendy v. Pascagoula, 193 So. 2d 559, 1967 Miss. LEXIS 1548 (Miss. 1967).

Where the negligent acts of two persons precipitate an emergency followed by an accident, and one of the parties is injured as a direct result of the prior acts of negligence of both, the other party is liable in damages to the injured party in proportion to his acts of negligence which contributed to the accident under the same rule as if the injury were caused by his negligence without an intervening emergency. Peel v. Gulf Transport Co., 252 Miss. 797, 174 So. 2d 377, 1965 Miss. LEXIS 1148 (Miss. 1965).

In an action against a city on behalf of an eight-year-old child injured when he fell into a drainage ditch, even if the plaintiff could have been guilty of contributory negligence, this was not a bar to recovery, but could be considered by the jury in determining the amount of damages, which presumably the jury did in arriving at the amount of the verdict. Shows v. Hattiesburg, 231 Miss. 648, 97 So. 2d 366, 1957 Miss. LEXIS 549 (Miss. 1957).

Since under the defendant's own admission he was guilty of negligence in proceeding into a through street without continuing to look for the hazard of plaintiff's approaching automobile, plaintiff was entitled to a peremptory instruction, and even though plaintiff may have been guilty of contributory negligence there would be an issue for the jury and, after plaintiff had been found guilty of contributory negligence, it would only diminish the amount of damages to be awarded to him. Wells v. Bennett, 229 Miss. 135, 90 So. 2d 199, 1956 Miss. LEXIS 594 (Miss. 1956).

In an action for injury sustained when a plaintiff's coal truck struck defendant's pick-up truck which was making a left turn in front of plaintiff's vehicle to enter an intersecting county road, even if plaintiff was contributorily negligent in driving at an excessive speed while visibility was poor, and failing to blow his horn, and in failing to slow down as he approached the intersection, under this section [Code 1942, § 1454] he was not barred from recovery, although the amount of damages which he might otherwise have been entitled to recover would be diminished in proportion to the amount of negligence, if any, attributable to him. Cobb v. Williams, 228 Miss. 807, 90 So. 2d 17, 1956 Miss. LEXIS 568 (Miss. 1956).

Plaintiff's negligence can be urged in mitigation of damages but not as bar to recovery, unless constituting sole, proximate cause. McClellan v. Illinois C. R. Co., 204 Miss. 432, 37 So. 2d 738, 1948 Miss. LEXIS 379 (Miss. 1948).

Even though a mechanic's helper, who died as result of a can of gasoline used in priming an engine being thrown on him after the gasoline therein had become ignited when the engine backfired, was contributorily negligent in choosing the particular can and in standing in a dangerous position, the jury could properly reduce the damages, if it should find that the employer was liable in negligently failing to furnish a safe priming can. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 1945 U.S. App. LEXIS 2067 (5th Cir. Miss. 1945).

City's negligence in construction and maintenance of streets is to be determined from its own conduct, without regard to whether the injured person was using reasonable care, and its liability becomes fixed when such negligence becomes the proximate cause of the injury; the negligence of the injured person becomes a relevant factor under this section [Code 1942, § 1454] as to the extent of such liability. City of Meridian v. King, 194 Miss. 162, 11 So. 2d 205, 11 So. 2d 830, 1942 Miss. LEXIS 168 (Miss. 1942).

If negligence of motorist in failing to have his automobile equipped with rear red light contributes to rear end collision, motorist is liable under concurrent negligence statute for his proportion of damages sustained by motorist who ran into automobile. Solomon v. Continental Baking Co., 172 Miss. 388, 160 So. 732, 1935 Miss. LEXIS 162 (Miss. 1935).

In actions for personal injuries, or for death resulting therefrom, contributory negligence is not a bar to recovery, but the damages are diminished in proportion to the amount of negligence attributable to the person injured or killed. Louisville & N. R. Co. v. Wickton, 55 F.2d 642, 1932 U.S. App. LEXIS 3779 (5th Cir. Miss. 1932).

Where a city maintains a zoo as a public park with wild and dangerous animals therein, it is responsible for damages caused by such animals, due to the negligence of its officers and agents, to persons visiting the park; but damages for the injury should be reduced on account of contributory negligence of the party injured. Byrnes v. Jackson, 140 Miss. 656, 105 So. 861, 1925 Miss. LEXIS 302 (Miss. 1925).

Contributory negligence of a servant who is injured goes to diminish his damages. Hardy v. Tuner-Farber-Love Co., 136 Miss. 355, 101 So. 489, 1924 Miss. LEXIS 142 (Miss. 1924).

Contributory negligence is no longer a defense for personal injuries, but goes only to the amount of damages. Mississippi C. R. Co. v. Lott, 118 Miss. 816, 80 So. 277, 1918 Miss. LEXIS 136 (Miss. 1918), cert. denied, 249 U.S. 616, 39 S. Ct. 391, 63 L. Ed. 803, 1919 U.S. LEXIS 2042 (U.S. 1919); Gulf & S. I. R. Co. v. Boone, 120 Miss. 632, 82 So. 335, 1919 Miss. LEXIS 116 (Miss. 1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415, 1920 U.S. LEXIS 1680 (U.S. 1920), writ of error dismissed, 252 U.S. 567, 40 S. Ct. 343, 64 L. Ed. 719, 1920 U.S. LEXIS 1092 (U.S. 1920).

Under this statute [Code 1942, § 1454] contributory negligence does not bar a recovery but will cause a reduction of damages for the injury. Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824, 1913 Miss. LEXIS 241 (Miss. 1913); Tombigbee Mill & Lumber Co. v. Hollingsworth, 162 F.2d 763, 1947 U.S. App. LEXIS 2188 (5th Cir. Miss.), cert. denied, 332 U.S. 824, 68 S. Ct. 165, 92 L. Ed. 399, 1947 U.S. LEXIS 1630 (U.S. 1947).

7. Evidence.

In a product liability suit, evidence of plaintiff's alcohol and drug use before riding an all-terrain vehicle (ATV), even though he was not legally intoxicated when he was hurt in an ATV accident, was not subject to exclusion on a motion in limine because it was relevant to the issue of contributory negligence under Miss. Code Ann. § 11-7-15. Fife v. Polaris Indus., Inc., 2008 U.S. Dist. LEXIS 9882 (S.D. Miss. Jan. 15, 2008).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages; the trial court did not err by refusing to instruct the jury on comparative negligence under Miss. Code Ann. § 11-7-15, and the jury's rejection of the claim was not against the weight of the evidence, and while the employee testified that employee did not check his boots prior to mounting the locomotive, the employee also testified on acting in compliance with the railroad's safety rules. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

Court's finding of contributory negligence on the part of plaintiff was proper where defendant bus driver testified that he came to a complete stop at the stop sign, he looked both ways for oncoming traffic before entering the intersection, both parties had a clear unobstructed view of the intersection as they approached from their respective directions, and defendant's bus was hit by plaintiff's truck, thus indicating a lack of evasive action on the part of plaintiff. Thompson ex rel. Thompson v. Lee County Sch. Dist.,

925 So. 2d 57, 2006 Miss. LEXIS 50 (Miss. 2006).

The jury may not reduce plaintiff's damages where the evidence fails to prove contributory negligence. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

Evidence warranted jury in automobile collision case in finding negligence and contributory negligence. Hawkins v. Hillman, 245 Miss. 385, 149 So. 2d 17, 1963 Miss. LEXIS 526 (Miss. 1963).

In an action for injuries sustained by plaintiff who was struck by an automobile while standing on the shoulder of a highway waiting for a ride, a finding that the plaintiff had stepped into the highway in front of an automobile was not supported by evidence and therefore did not warrant the jury in employing the comparative negligence doctrine, and a new trial would be granted on the issue of damages alone when all the facts should be presented to the jury on the question of negligence and the jury will have the right to apportion the damages under the comparative negligence statute. Vaughan v. Bollis, 221 Miss. 589, 73 So. 2d 160, 1954 Miss. LEXIS 567 (Miss. 1954).

Evidence that excessive speed of train directly and proximately contributed to pedestrian's death, in that pedestrian was unable to get out of the way, supported verdict allowing recovery, notwithstanding evidence of pedestrian's contributory negligence. Gulf & S. I. R. Co. v. Bond, 181 Miss. 254, 179 So. 355, 181 So. 741, 1938 Miss. LEXIS 67 (Miss. 1938), overruled, Illinois C. R. Co. v. Nelson, 245 Miss. 395, 146 So. 2d 69, 1963 Miss. LEXIS 527, 1963 Miss. LEXIS 547, 1962 Miss. LEXIS 560 (Miss. 1962), overruled in part, Illinois C. R. Co. v. Nelson, 245 Miss. 411, 148 So. 2d 712 (Miss. 1963).

In trial of damage issue after judgment was reversed as to amount of damages and was remanded for trial on that issue only, evidence as to negligence of defendant and contributory negligence of plaintiff held admissible, since such negligence entered into fixation of damages under statute. Mississippi C. R. Co. v. Smith, 176 Miss. 306, 168 So. 604, 1936 Miss. LEXIS 129 (Miss. 1936).

8. Questions for jury.

Extent to which negligence defendant may escape liability by arguing that condition causing damage to plaintiff was open and obvious is question for jury. Bell v. Bay St. Louis, 467 So. 2d 657, 1985 Miss. LEXIS 2020 (Miss. 1985).

In accordance with the provisions of this section [Code 1942, § 1454], contributory negligence on the part of a pedestrian struck and killed by an automobile is not a bar to a recovery if there is negligence proved on the part of the defendant motorist, but all questions of contributory negligence or comparative negligence should be submitted to the jury for the jury's determination where there is such a question. Hogan v. Cunningham, 252 Miss. 216, 172 So. 2d 408, 1965 Miss. LEXIS 1092 (Miss. 1965).

The right under this section [Code 1942, § 1454] to apportion damages is for the jury, in the light of the circumstances and reasonable bounds. Southeastern Constr. Co. v. Dependent of Dodson, 247 Miss. 1, 153 So. 2d 276, 1963 Miss. LEXIS 277 (Miss. 1963).

In bowler's action to recover for damages for injuries sustained in fall allegedly due to the negligence of the bowling establishment proprietor, questions as to assumption of risks and contributory negligence should have gone to jury under proper instructions. Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 146 So. 2d 558, 1962 Miss. LEXIS 543 (Miss. 1962).

Where a judgment in an action arising out of an intersectional motor vehicle collision was reversed and remanded for retrial on the question of the amount of damages alone, upon the retrial all the facts should be presented to the jury on the question of the negligence of all parties, and a jury would have the right to apportion damages under the comparative negligence statute. Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

On retrial of personal injury action on issue of damages only, the evidence should not be limited to the question of damages, but all of the facts should be presented for the jury's consideration as to the negligence of all parties, and the jury could apportion damages under the comparative negligence statute. Jenkins v. Cogan, 238 Miss. 543, 119 So. 2d 363, 1960 Miss. LEXIS 438 (Miss. 1960).

Although motorist's failure to stop before attempting to cross railroad tracks was negligence contributing to the collision with a railroad switch engine, trial court properly refused railroad's requested peremptory instruction where the evidence presented questions for the jury as to whether the proximate cause of the collision was failure of the railroad to ring the bell on its engine, or the negligence of the railroad's engineer in failing to stop the engine when the engineer saw that motorist's automobile was not going to stop. New Orleans & N. R. Co. v. Ready, 238 Miss. 199, 118 So. 2d 185, 1960 Miss. LEXIS 396 (Miss. 1960).

In an action against a railroad and its engineer for damages to a tractor trailer caused by a crossing collision, where the evidence established that the railroad and its engineer was liable as a matter of law, but also raised jury questions as to the contributory negligence, if any, of the truck driver, whether under the comparative negligence statute plaintiff's damages sustained should have been diminished, whether the negligence of the engineer was the sole, proximate cause of the collision, and the applicability of the last clear chance doctrine, the case was reversed and remanded for submission to a jury on issues of damages alone. New Orleans & N. R. Co. v. Dixie Highway Express, Inc., 230 Miss. 92, 92 So. 2d 455, 1957 Miss. LEXIS 348 (Miss. 1957).

In a death action arising out of a collision between decedent's truck and defendant's train at a railroad crossing, the conflicting testimony as to the speed of the train and as to the giving of statutory signals, when considered in connection with the alleged obstruction of decedent's view by a packing shed, depot building, and two box cars along the west side of the packing shed, all tending to show that the decedent could not have seen the train by exercising reasonable care until he was in the act of crossing the track, presented an issue for the jury. Illinois C. R. Co. v. Sanders, 229 Miss. 139, 90 So. 2d 366, 1956 Miss. LEXIS 595 (Miss. 1956), overruled, Sheffield v. Sheffield, 405 So. 2d 1314, 1981 Miss. LEXIS 2053 (Miss. 1981).

It is for the jury to decide whether it will diminish the damages in proportion to the amount of negligence attributable to the plaintiff when under all the testimony and circumstances thereby shown a part of the negligence contributing to plaintiff's injuries was attributable to his own negligence, even if no instruction to this effect is requested by either party. Mutual Life Ins. Co. v. Rather, 221 Miss. 527, 73 So. 2d 163, 1954 Miss. LEXIS 559 (Miss. 1954).

In an action by a bicyclist against a cab company for injuries suffered when he jumped off the bicycle to avoid being crushed by the cab against a van type truck ahead, the question of excessive speed of the cab and the proximate cause of the negligence was for the jury. Coker v. Five-Two Taxi Service, Inc., 211 Miss. 820, 52 So. 2d 356, 1951 Miss. LEXIS 412 (Miss. 1951).

Where the place of work was not obviously safe, it was for the jury to determine whether the method was safe which an employee chose in the performance of an assigned task. Tombigbee Mill & Lumber Co. v. Hollingsworth, 162 F.2d 763, 1947 U.S. App. LEXIS 2188 (5th Cir. Miss.), cert. denied, 332 U.S. 824, 68 S. Ct. 165, 92 L. Ed. 399, 1947 U.S. LEXIS 1630 (U.S. 1947).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high powered wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power, or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

In an action by an employee against his employer for injuries sustained by reason of an explosion resulting from the use of gasoline, mistakenly thought to be kerosene, in starting a fire for the purpose of heating grease guns and warming the employees in connection with construction of a highway, questions with respect to the employer's duty to furnish a reasonably safe place for its employees to work, reasonably safe instrumentalities to work with, and a reasonably safe method and rules under which to work, were for the jury, the comparative negligence statute answering to some extent the employer's argument that it was entitled to a directed verdict. Curry & Turner Const. Co. v. Bryan, 184 Miss. 44, 185 So. 256, 1939 Miss. LEXIS 18 (Miss. 1939).

In an action against a railroad for injuries sustained in a railroad crossing collision by an automobile owner while riding as a passenger in his automobile driven by another with his permission and in his interests, questions of the negligence of the railroad in failing to give statutory signals at crossings and the negligence of the driver of the automobile, imputable to the owner, were for the jury, since under this section [Code 1942, § 1454] it is the duty of the jury to compare and allocate the negligence of the parties under instruction of the court. Flynn v. Kurn, 183 Miss. 413, 184 So. 160, 1938 Miss. LEXIS 256 (Miss. 1938).

Statute imposing duty of diminishing damages because of contributory negligence should be observed by juries. Gulf & S. I. R. Co. v. Bond, 181 Miss. 254, 179 So. 355, 181 So. 741, 1938 Miss. LEXIS 67 (Miss. 1938), overruled, Illinois C. R. Co. v. Nelson, 245 Miss. 395, 146 So. 2d 69, 1963 Miss. LEXIS 527, 1963 Miss. LEXIS 547, 1962 Miss. LEXIS 560 (Miss. 1962), overruled in part, Illinois C. R. Co. v. Nelson, 245 Miss. 411, 148 So. 2d 712 (Miss. 1963).

Whether motorist whose automobile struck a gondolo car, spotted by railroad employees so that it extended partly across public highway, was contributorily negligent held for jury. Magers v. Okolona, H. & C. C. R. Co., 174 Miss. 860, 165 So. 416, 1936 Miss. LEXIS 201 (Miss. 1936).

Liability of railroad for death of motorist in crossing collision and question of damages in view of deceased's contributory negligence were for the jury. Louisville & N. R. Co. v. Wickton, 55 F.2d 642, 1932 U.S. App. LEXIS 3779 (5th Cir. Miss. 1932).

Negligence of town in respect to injury to pedestrian stumbling on stake on sidewalk held for jury. Gould v. Newton, 157 Miss. 111, 126 So. 826, 1930 Miss. LEXIS 239 (Miss. 1930).

9. Instructions.

Finding against the operator in an action for negligence brought by the driver and passenger was proper because a jury instruction improperly stated that even if the jury found that the operator's speed was excessive and that the excessive speed was the proximate cause of the accident, that the operator could avoid culpability due to the intervening negligence of another person. Denham v. Holmes, 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

Denial of a driver and passenger's motion for a new trial in their negligence action after the jury found in favor of the other driver was improper because the driver and passenger were denied their right to a fair trial. In part, Mississippi was a pure comparative-negligence state and because a jury instruction implied contributory negligence, it was a misstatement of the law and was potentially misleading to the jury. Denham v. Holmes, 60 So. 3d 803, 2010 Miss. App. LEXIS 148 (Miss. Ct. App. 2010), aff'd on other grounds, 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

In a suicide wrongful death case against a doctor, plaintiff waived her claim that the court should have given the jury an apportionment instruction due to the fact that the doctor put forth evidence that the decedent's husband and other family members caused the decedent to commit suicide because plaintiff stated in a discovery response that no heir had exacerbated the decedent's mental illness, and plaintiff provided no other theory as to how an heir could be held partially responsible for the suicide. Young v. Guild, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), sub. op., op. withdrawn, 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

When a comparative negligence instruction is given, the jury should be instructed as to an alternative format for the rendering of a comparative negligence verdict which provides for an apportionment of fault or damages if both parties are found to be negligent. Burton v. Barnett, 615 So. 2d 580, 1993 Miss. LEXIS 90 (Miss. 1993).

When there is evidence to support a comparative negligence instruction, it is not error to give the instruction even though each party may contend that the other was entirely at fault. Pham v. Welter, 542 So. 2d 884, 1989 Miss. LEXIS 148 (Miss. 1989).

Instruction that would allow jury to find that plaintiff was independent intervening cause of accident, and therefore sole proximate cause, of accident merely because she was involved in accident, no matter how negligent defendant might have been, was error. Blackmon v. Payne, 510 So. 2d 483, 1987 Miss. LEXIS 2522 (Miss. 1987).

The giving of instruction on contributory negligence without stating the facts necessary to constitute contributory negligence is, unless cured by other instructions given, reversible error. City of Jackson v. Copeland, 490 So. 2d 834, 1986 Miss. LEXIS 2483 (Miss. 1986).

A jury instruction in an automobile collision case for the defendant to the effect that if the jury finds, after considering all of the evidence, that the evidence is evenly balanced for the defendant and for a plaintiff, they must find for the defendant, was erroneously granted. First Nat'l Bank v. Mississippi State Highway Com., 227 So. 2d 118, 1969 Miss. LEXIS 1336 (Miss. 1969).

An instruction is erroneous which would cut off any recovery by the plaintiff as a result of contributory negligence on his part. Bozeman v. Tucker, 203 So. 2d 795, 1967 Miss. LEXIS 1393 (Miss. 1967).

Instructions which fail to allow the jury the right to apply the comparative negligence statute are defective and erroneous. Bozeman v. Tucker, 203 So. 2d 795, 1967 Miss. LEXIS 1393 (Miss. 1967).

In action brought by house mover against electric company for injuries he received from coming into contact with live power line, an instruction for defendant that if jury believed plaintiff knew and appreciated dangers existing in connection with overhead power line and voluntarily placed himself in a position to come in contract with it he had assumed the risks incident thereto, including any negligence of defendant, defendant would not be liable for plaintiff's injuries, was erroneously granted; for it prevented application of comparative negligence doctrine by jury and eliminated distinction between assumption of risk and contributory negligence, where there was evidence in record to the effect that an employee of defendant told plaintiff the wire was harmless and plaintiff should take hold of it and lift it up. Crouch v. Mississippi Power & Light Co., 193 So. 2d 144, 1966 Miss. LEXIS 1283, 1967 Miss. LEXIS 1546 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that the jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

An instruction for the defendant in a wrongful death action that if the jury believes from the evidence that the injury and subsequent death of the plaintiff was proximately caused by the negligence, if any, of the plaintiff, then the jury should return a verdict for the defendant, is an erroneous instruction and in conflict with the provisions of this section [Code 1942, § 1454]. Hogan v. Cunningham, 252 Miss. 216, 172 So. 2d 408, 1965 Miss. LEXIS 1092 (Miss. 1965).

Although the defendant in a wrongful death action did not ask for or receive an instruction on contributory negligence, the jury had the right to apply the comparative negligence statute without an instruction to that effect. Winstead v. Hall, 251 Miss. 800, 171 So. 2d 354, 1965 Miss. LEXIS 904 (Miss. 1965).

Where facts constituting contributory negligence are pleaded and proved, a request to instruct on contributory negligence is not essential to enable the jury to consider it in assessing damages. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

To instruct jury that contributory negligence will defeat recovery is erroneous under this provision. Arnold Services, Inc. v. Delta Motor Lines, Inc., 325 F.2d 860, 1963 U.S. App. LEXIS 3327 (5th Cir. Miss. 1963).

Instruction in action for alleged negligent installation of machine that jury should find for defendant if they found that the machine was not being handled properly by plaintiff, held erroneous. Pevey v. Alexander Pool Co., 244 Miss. 25, 139 So. 2d 847, 1962 Miss. LEXIS 418 (Miss. 1962).

In an automobile collision case, where the testimony as to the negligence of the respective parties, the drivers of the vehicles, was sharply conflicting, the court was warranted in giving an instruction on contributory negligence. Ferguson v. Denton, 239 Miss. 591, 124 So. 2d 279, 1960 Miss. LEXIS 327 (Miss. 1960).

The trial court was warranted in giving to the defendants a comparative negligence instruction in an action arising out of an intersectional motor vehicle collision. Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

An instruction in an action by one who slipped on a wet floor in a store entrance that plaintiff assumed such risks as were obvious to a person of ordinary intelligence, and that if plaintiff saw, knew and appreciated the danger, or should have done so by the exercise of reasonable care, the finding should be for the defendant is erroneous as eliminating the distinction between assumption of risk and contributory negligence and as denying the jury's right to weigh the respective negligence, if any, of the parties. Wallace v. J. C. Penney Co., 236 Miss. 367, 109 So. 2d 876, 1959 Miss. LEXIS 328 (Miss. 1959).

In an action against an automobile driver for injuries sustained by a bicyclist, instructions to the jury that the plaintiff could not recover if he did not keep his bicycle under control, failed to keep a proper lookout for others on the highway and did not use due care to avoid placing himself in a place of danger so as to create emergency, failed to take into account the provisions of comparative negligence statutes which provide that the plaintiff's contributory negligence shall not bar a recovery, if the proof showed that the defendant was negligent and that the defendant's negligence was the proximate contributing cause to the plaintiff's injuries. Rivers v. Turner, 223 Miss. 673, 78 So. 2d 903, 1955 Miss. LEXIS 422 (Miss. 1955).

In an action for damages for personal injury alleged to have been sustained as the result of stepping into a hole or depression in a public walkway in which the defendant had laid its gas main, refusal of plaintiff's instruction that contributory negligence of the plaintiff shall not bar recovery was error, even though the instruction did not contain a direction for diminishing damages in accordance with this section [Code 1942, § 1454]. Mason v. United Gas Corp., 222 Miss. 311, 75 So. 2d 736, 1954 Miss. LEXIS 647 (Miss. 1954).

In an action for damages sustained in an automobile collision an instruction to the jury to the effect that recovery could not be had if both parties were equally negligent and their negligence contributed equally to the proximate cause of the collision, was in violation of this section [Code 1942, § 1454]. Carruth v. Griffis, 220 Miss. 541, 71 So. 2d 478, 1954 Miss. LEXIS 469 (Miss. 1954).

If the defendant in a negligence suit had desired to avail himself of the statutory right to have the damages diminished in proportion to negligence, if any, of the plaintiff, it was his duty to request the court to so instruct the jury. Mason v. United Gas Corp., 222 Miss. 311, 75 So. 2d 736, 1954 Miss. LEXIS 647 (Miss. 1954); Alabama & V. R. Co. v. McGee, 117 Miss. 370, 78 So. 296, 1918 Miss. LEXIS 187 (Miss. 1918); Ouille v. Saliba, 246 Miss. 365, 149 So. 2d 468, 1963 Miss. LEXIS 450 (Miss. 1963).

An instruction to the jury as to age, intelligence, knowledge, experience and discretion of a child should be confined to the time of accident, not to the time of the trial. Johnson v. Howell, 213 Miss. 195, 56 So. 2d 491, 1952 Miss. LEXIS 349 (Miss. 1952).

An instruction to the jury that the plaintiff must prove the charge of negligence by a preponderance of credible evidence and that the jury find the evidence touching the charge of negligence against the defendant to be evenly balanced, after fairly considering it, it was their duty to return a verdict for the defendant, was conceptually correct where it was limited by another instruction which limited the above to element of negligence. Evans v. Jackson City Lines, Inc., 212 Miss. 895, 56 So. 2d 80, 1952 Miss. LEXIS 324 (Miss. 1952).

Instructions which are fundamentally in violation of this statute [Code 1942,

§ 1454] by absolving defendant from liability for negligence if plaintiff is also negligent are substantially erroneous and will not be cured by other instructions in record. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

Instruction that if jury believed from evidence that plaintiff and defendant were equally negligent, jury should find for defendant, is erroneous, for if both were negligent equally, defendant would not be absolved from liability altogether, but plaintiff's damages would be reduced by fifty per cent. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

In action for damages to automobile arising out of ramming by truck, instruction that even if jury believed from preponderance of evidence that defendant was guilty of negligence, if jury also believed that plaintiff was negligent, jury should find for defendant or diminish plaintiff's actual damages in such proportion as plaintiff's negligence may have contributed to accident is erroneous and should not have been given. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

In employee's suit against employer for personal injuries where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instruction eliminating entirely the question of whether or not the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action, was error. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

Speed of train when plaintiff, who had boarded train to assist passenger with luggage, alighted, has bearing in action for injuries sustained in getting off train only on question of whether railroad company is entitled to have jury instructed, as a matter of law, that plaintiff was guilty of negligence mitigating damages. McClellan v. Illinois C. R. Co., 204 Miss. 432, 37 So. 2d 738, 1948 Miss. LEXIS 379 (Miss. 1948).

In action for injuries resulting from automobile collision at intersection of cross road with through traffic lane, failure to give a comparative negligence instruction on behalf of plaintiff is not erroneous when instruction was not requested and plaintiff predicated liability on finding that defendant was negligent and defendant's negligence was the sole, proximate cause of plaintiff's injuries. Davidian v. Wendell, 37 So. 2d 570 (Miss. 1948).

In action for death of child caused by negligent act of defendant, an instruction authorizing jury to take into consideration "any negligence on the part of the deceased child" is properly refused as the instruction fails to set forth elements of such negligence, if any, and its proximate contribution to injuries. Stevenson v. Robinson, 37 So. 2d 568 (Miss. 1948).

Under Mississippi law a defendant may not have the advantage of this section [Code 1942, § 1454] unless he pleads contributory negligence and requests an instruction on comparative negligence and diminution of damages. Railway Exp. Agency v. Mallory, 168 F.2d 426, 1948 U.S. App. LEXIS 2064 (5th Cir. Miss.), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378, 1948 U.S. LEXIS 1803 (U.S. 1948).

The trial court could not voluntarily instruct the jury to apportion damages where the defendant did not request that the jury consider his rights in the matter of comparative negligence. Robinson v. Colotta, 199 Miss. 800, 26 So. 2d 66, 1946 Miss. LEXIS 248 (Miss. 1946).

Where contributory negligence on the part of plaintiff which contributed to the accident is shown, and the defendant has properly invoked the comparative negligence statute, it is reversible error for the trial court to instruct the jury, in effect, that they may disregard the statute. Moore v. Abdalla, 197 Miss. 125, 19 So. 2d 502, 1944 Miss. LEXIS 281 (Miss. 1944).

Instructions for defendant in personal injury action that if the jury should find that both plaintiff and defendant were guilty of negligence, proximately causing the accident or proximately contributing to the cause of such accident, and the jury should return any verdict for the plaintiff, then under their oath the jury must lessen any damages, if any, awarded to the plaintiff to the amount of negligence attributable to the plaintiff, was not reversible error, although the court might better have followed the unambiguous language of this section [Code 1942, § 1454]. Clary v. Breyer, 194 Miss. 612, 13 So. 2d 633, 1943 Miss. LEXIS 106 (Miss. 1943).

In action against truck owner for death of truck driver caused by flat tire on truck, instruction that driver's contributory negligence in driving truck after one tire had been repaired after blowout would not bar recovery, held not erroneous. Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285, 1938 Miss. LEXIS 97 (Miss. 1938).

Plaintiff's instructions authorizing recovery despite contributory negligence and assessment of full damages in event of finding for plaintiff held violative of statutory requirement for proportionate diminution of damages. Graves v. Johnson, 179 Miss. 465, 176 So. 256, 1937 Miss. LEXIS 49 (Miss. 1937).

In view of this section [Code 1942, § 1454], automobile owner held not entitled to more than instruction directing jury to consider passenger's contributory negligence. Watson v. Holiman, 169 Miss. 585, 153 So. 669, 1934 Miss. LEXIS 68 (Miss. 1934).

Instruction permitting jury to consider plaintiff's contributory negligence, if any, in diminution of damages, where not pleaded, if error, held harmless where jury found plaintiff's negligence was sole proximate cause of injury. White v. Weitz, 169 Miss. 102, 152 So. 484, 1934 Miss. LEXIS 9 (Miss. 1934).

That each motorist claimed collision was caused by the other's negligence did not render instruction based on comparative negligence statute erroneous. Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356, 1929 Miss. LEXIS 288 (Miss. 1929).

This statute [Code 1942, § 1454] makes it proper to instruct the jury that they should apportion the damages. Hudson v. Louisville & N. R. Co., 30 F.2d 391, 1929 U.S. App. LEXIS 2415 (5th Cir. Miss. 1929).

Instruction based on comparative negligence statute held not erroneous because not instructing jury to diminish damages in proportion to negligence of plaintiff. Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356, 1929 Miss. LEXIS 288 (Miss. 1929); White v. Chicago Southern Transp. Co., 226 Miss. 294, 84 So. 2d 161, 1955 Miss. LEXIS 633 (Miss. 1955).

Instruction that contributory negligence of person in collision between automobile and train would not bar recovery held not erroneous, when considered with instructions as a whole. Gulf & S. I. R. Co. v. Simmons, 150 Miss. 506, 117 So. 345, 1928 Miss. LEXIS 182 (Miss. 1928).

By reason of this provision, Hemingway's Code 1917, § 502, it is proper to refuse a charge that a defendant is not liable if the plaintiff is guilty of contributory negligence. Reynolds-West Lumber Co. v. Kellum, 19 F.2d 72, 1927 U.S. App. LEXIS 2188 (5th Cir. Miss. 1927).

Unless the speeding of the automobile was the sole cause of the injury complained of, an instruction that if the speed exceeded ten miles per hour approaching defective bridge the plaintiff could not be allowed to recover, is erroneous. Dent v. Mendenhall, 139 Miss. 271, 104 So. 82, 1925 Miss. LEXIS 137 (Miss. 1925).

An instance of erroneous instruction as to diminution of damages. Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 So. 187, 1923 Miss. LEXIS 97 (Miss. 1923).

An instance of an erroneous instruction with reference to comparative negligence contributing to the injury. Yazoo & M. V. R. Co. v. Mullins, 125 Miss. 242, 87 So. 490, 1921 Miss. LEXIS 112 (Miss. 1921).

A jury may be instructed that mere contributory negligence does not bar a recovery of damages for death. Illinois C. R. Co. v. Archer, 113 Miss. 158, 74 So. 135, 1916 Miss. LEXIS 37 (Miss. 1916).

A party to the suit desiring that the jury be instructed as to the effect of contributory negligence must ask such instruction. Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459, 1914 Miss. LEXIS 279 (Miss. 1914).

10. — Peremptory instruction.

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, reasonable minds could have differed as to liability, and the jury's verdict for defendant driver and his employer was supported by substantial evidence; the trial court erred by granting the plaintiff a new trial and ordering that the new jury be peremptorily instructed that defendant driver was negligent as a matter of law. White v. Stewman, 932 So. 2d 27, 2006 Miss. LEXIS 315 (Miss. 2006).

The trial court properly denied a peremptory instruction to defendant power company in an action by plaintiff injured when his television antenna, which he was negligently handling, came in contact with a high voltage line, where there was a question of fact as to whether defendant should have isolated, insulated, or guarded its lines and as to whether it should have issued a warning. Evans v. State Farm Fire & Casualty Co., 336 So. 2d 753, 1976 Miss. LEXIS 1524 (Miss. 1976).

A peremptory instruction should have been granted in an action against an employer by an employee who was injured when a steel rim sprung out and struck him as he was changing a truck tire, the evidence showing that he was familiar with the proper method and that the employer had a right to so assume. Masonite Corp. v. Stevens, 201 Miss. 876, 30 So. 2d 77, 1947 Miss. LEXIS 459 (Miss. 1947).

Even if a fire, started by railroad employees to burn the grass on railroad property and left without complete extinguishment, had already reached the plaintiff's premises when plaintiff's foreman put out some of the fire but not all of it, plaintiff would still be entitled to at least nominal damages for destruction of the gin on her premises, which in itself was sufficient to avoid a peremptory instruction requested by the railroad in an action against it for damages. Yazoo & M. V. R. Co. v. Fields, 188 Miss. 725, 195 So. 489, 1940 Miss. LEXIS 56 (Miss. 1940).

Under this statute [Code 1942, § 1454] contributory negligence does not bar a recovery, and therefore it is not error to deny a peremptory instruction for the defendant. Perez v. Fayard, 64 F.2d 667, 1933 U.S. App. LEXIS 4188 (5th Cir. Miss. 1933).

An instance where peremptory instruction should have been given for the admitted or proven negligence of defendant causing injury. Illinois C. R. Co. v. Archer, 113 Miss. 158, 74 So. 135, 1916 Miss. LEXIS 37 (Miss. 1916).

11. Damages.

In an action brought by a city against an architect-engineer and contractors for damages resulting from the failure of a protective levy surrounding the construction site of a waste water treatment plant in which both defendants counterclaimed and crossclaimed, the record supported an apportionment of liability in favor of the city for installation of a second slurry wall to be 50 percent against the architect-engineer and 50 percent against the contractor pursuant to Miss Code § 11-7-15. Moreover, the architect-engineer was required to bear the sole responsibility to the city for damages resulting from the levy failures as well as repairs to the access bridge. Columbus v. Clark-Dietz & Associates-Engineers, Inc., 550 F. Supp. 610, 1982 U.S. Dist. LEXIS 15668 (N.D. Miss. 1982).

Under the Mississippi comparative negligence statute, the negligence of a father who took his 5-year-old son across a highway so that the son might buy milk and failed to take steps so that the son might return safely, when possible negligence on the part of drivers on the highway was or should have been foreseeable by the father, was twice as great as the negligence of a truckdriver who failed to see the child recrossing the highway, so that the whole damages sustained by the father must be reduced by two thirds, limiting the recovery against the defendant employer of the truckdriver to one third of the sum. Wright v. Standard Oil Co., 319 F. Supp. 1364, 1970 U.S. Dist. LEXIS 9331 (N.D. Miss. 1970), rev'd, 470 F.2d 1280, 1972 U.S. App. LEXIS 6335 (5th Cir. Miss. 1972).

Where on a new trial, granted because of an erroneous instruction on contributory negligence, damages alone should be submitted to the jury, but the defendant may assert, in diminution of damages, any negligence on the part of plaintiff's decedent which can be shown to have contributed to the injuries sustained by the decedent. Glover v. Daniels, 310 F. Supp. 750, 1970 U.S. Dist. LEXIS 12400 (N.D. Miss. 1970).

Damages for personal injury will not be held grossly inadequate where jury, in determining amount, may have found contributory negligence. Ramsey v. Price, 249 Miss. 192, 161 So. 2d 778, 1964 Miss. LEXIS 385 (Miss. 1964).

Where a judgment in an action arising out of an intersectional motor vehicle collision was reversed and remanded for retrial on the question of the amount of damages alone, upon the retrial all the facts should be presented to the jury on the question of the negligence of all parties, and a jury would have the right to apportion damages under the comparative negligence statute. Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

On retrial of personal injury action on issue of damages alone, the evidence should not be limited to question of damages, but all the facts bearing upon the issue of negligence of all parties should be presented, and the jury could apportion damages under the comparative negligence statute. Jenkins v. Cogan, 238 Miss. 543, 119 So. 2d 363, 1960 Miss. LEXIS 438 (Miss. 1960).

In rendering a verdict for cross-complainant, the respective amounts found for complainant and cross-complainant need not be indicated. Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194, 1959 Miss. LEXIS 559 (Miss. 1959).

In a proceeding on libel for collision, damages would be apportioned equally in a case where both parties had been at fault to the extent of twenty per cent and eighty per cent. In re Adams, 125 F. Supp. 110, 1954 U.S. Dist. LEXIS 2632 (D.N.Y. 1954), aff'd, 237 F.2d 884, 1956 U.S. App. LEXIS 4743 (2d Cir. N.Y. 1956).

Although no instruction was given concerning comparative negligence statutes, a jury was authorized to apply the statutes in determining award for injuries sustained in automobile collision. Gilliam v. Sykes, 216 Miss. 54, 61 So. 2d 672, 1952 Miss. LEXIS 613 (Miss. 1952).

Where neither the plaintiff nor the defendant in an automobile collision case requested instructions based upon the comparative negligence statute, the jury was not required to apportion and compare the damages on account of the negligence of the parties; the court could not voluntarily instruct the jury on the subject; and the reviewing court could not consider the comparative negligence of the parties in determining whether the verdict was excessive. Avent v. Tucker, 188 Miss. 207, 194 So. 596, 1940 Miss. LEXIS 28 (Miss. 1940).

Contributory negligence of one of statutory beneficiaries held not imputed to other beneficiaries, so as to reduce damages recoverable from tort-feasor for death. Nosser v. Nosser, 161 Miss. 636, 137 So. 491, 1931 Miss. LEXIS 286 (Miss. 1931).

Minor under 14 years employed in violation of law is not chargeable with contributory negligence requiring reduction of damages. Hartwell Handle Co. v. Jack, 149 Miss. 465, 115 So. 586, 1928 Miss. LEXIS 51 (Miss. 1928).

A jury must diminish damages in proportion to contributory negligence of the injured person, but a motion for a new trial in the court below is necessary to a review of the adequacy of damages in the supreme court. Tendall v. Davis, 129 Miss. 30, 91 So. 701, 1922 Miss. LEXIS 17 (Miss. 1922).

Plaintiff guilty of gross negligence, contributing to the injury, in crossing a railroad track at a private crossing is entitled to recover damages. Yazoo & M. V. R. Co. v. Williams, 114 Miss. 236, 74 So. 835, 1917 Miss. LEXIS 24 (Miss. 1917); Mobile & O. R. Co. v. Campbell, 114 Miss. 803, 75 So. 554, 1917 Miss. LEXIS 87 (Miss. 1917).

12. —Amount of damages.

Award of only $500 in actual damages to a motorcyclist who suffered severe injuries in a collision with automobile driven by unlicensed defendant was not erroneous, under showing that motorcyclist's negligence contributed to the accident. Employers Mut. Casualty Co. v. Tompkins, 490 So. 2d 897, 1986 Miss. LEXIS 2489 (Miss. 1986).

Plaintiff is entitled to 50 percent of the damages arising from a pedestrian's death where the pedestrian and the truckdriver who struck him were equally negligent in that the truckdriver failed to reduce the speed of his truck to avoid striking the decedent when the decedent came within range of the truck's headlamps and the decedent, who was at a point in the roadway where there was not a marked crosswalk or an intersection, failed to perform his duty to yield the right-of-way to the truck. Hornburger v. Baird, 508 F. Supp. 84, 1980 U.S. Dist. LEXIS 16076 (N.D. Miss. 1980).

An award of $3000 damages to one who had sustained permanent and painful injuries in an automobile collision, and who in consequence had expended $3564, held grossly disproportionate to any contributory negligence imputable to plaintiff, and to justify the conclusion that it was either the result of passion or prejudice, or of a failure properly to evaluate plaintiff's damages. Swartzfager v. Southern Bell Tel. & Tel. Co., 236 Miss. 322, 110 So. 2d 380, 1959 Miss. LEXIS 322 (Miss. 1959).

Twenty thousand dollars for the death of a lineman, resulting from his electrocution while working on a pole containing a high voltage wire, was not excessive since the jury was not required to apportion and compare the damages on account of the negligence of the parties, where the case was tried on the theory that either the power company's alleged negligence was the sole proximate cause of the injury or the negligence of the deceased lineman was the sole proximate cause of his injury. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

Award of one-sixth of the actual damages in a personal injury action did not represent a proper adjustment of responsibility under this section [Code 1942, § 1454] where there was no evidence that the plaintiff was negligent in any way; such verdict evinced passion and prejudice and should not be allowed to stand. Dixon v. Breland, 192 Miss. 335, 6 So. 2d 122, 1942 Miss. LEXIS 21 (Miss. 1942).

In view of fact that plaintiff and others were pushing his stalled automobile off the highway when defendant, whose headlights had a range of 500 to 600 feet, crashed into the rear of plaintiff's automobile, demolishing it and severely injuring plaintiff, an award of $100 damages was so inadequate as to evince prejudice justifying reversal. Lee v. Reynolds, 190 Miss. 692, 1 So. 2d 487, 1941 Miss. LEXIS 83 (Miss. 1941).

Ten thousand dollars to widow and two children, aged 1 and 3 years, for death of 24-year-old husband and father, earning $12 per week, held excessive by $2,500, decedent's negligence having been greater than negligence of railroad. Gulf & S. I. R. Co. v. Bond, 181 Miss. 254, 179 So. 355, 181 So. 741, 1938 Miss. LEXIS 67 (Miss. 1938), overruled, Illinois C. R. Co. v. Nelson, 245 Miss. 395, 146 So. 2d 69, 1963 Miss. LEXIS 527, 1963 Miss. LEXIS 547, 1962 Miss. LEXIS 560 (Miss. 1962), overruled in part, Illinois C. R. Co. v. Nelson, 245 Miss. 411, 148 So. 2d 712 (Miss. 1963).

Four hundred dollars for fractured skull and hip not inadequate under evidence authorizing damages proportionate to negligence of injured person. Pounders v. Day, 151 Miss. 436, 118 So. 298, 1928 Miss. LEXIS 324 (Miss. 1928).

An instance of the award of excessive damages. Yazoo & M. V. R. Co. v. Williams, 114 Miss. 236, 74 So. 835, 1917 Miss. LEXIS 24 (Miss. 1917).

RESEARCH REFERENCES

ALR.

Contributory negligence as defense to action by state, United States, municipality, or other governmental unit. 1 A.L.R.2d 827.

Contributory negligence of one or more of the beneficiaries in an action for death as affecting the right of other beneficiaries who were not negligent. 2 A.L.R.2d 785.

Contributory negligence of parent as bar to an action by parent or administrator for death of child. 2 A.L.R.2d 785.

Contributory negligence of beneficiary as affecting action under death or survival statute. 2 A.L.R.2d 785.

Contributory negligence as a defense to a cause of action based upon violation of statute. 10 A.L.R.2d 853.

Contributory negligence of driver of motor vehicle as imputable to owner under statute making owner responsible for negligence of driver. 11 A.L.R.2d 1437.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 A.L.R.2d 611.

Application of last clear chance doctrine in comparative negligence case. 59 A.L.R.2d 1261.

Modern trends as to contributory negligence of children. 77 A.L.R.2d 917.

Comment Note–The doctrine of comparative negligence and its relation to the doctrine of contributory negligence. 32 A.L.R.3d 463.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence. 37 A.L.R.3d 1438.

Construction of “good Samaritan” statute excusing from civil liability one rendering care in emergency. 39 A.L.R.3d 222.

Modern development of comparative negligence doctrine having applicability to negligence actions generally. 78 A.L.R.3d 339.

Judicial adoption of comparative negligence doctrine as applicable retrospectively. 78 A.L.R.3d 421.

Choice of law as to application of comparative negligence doctrine. 86 A.L.R.3d 1206.

Automobile occupant’s failure to use seat belt as contributory negligence. 92 A.L.R.3d 9.

Nonuse of automobile seatbelts as evidence of comparative negligence. 95 A.L.R.3d 239.

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 A.L.R.4th 633.

Effect of adoption of comparative negligence rules on assumption of risk. 16 A.L.R.4th 700.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises. 19 A.L.R.4th 1110.

Contributory negligence and assumption of rish in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 20 A.L.R.4th 517.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child. 26 A.L.R.4th 396.

Effect of plaintiff's comparative negligence in reducing punitive damages recoverable. 27 A.L.R.4th 318.

Exterminator’s tort liability for personal injury or death directly resulting operations. 29 A.L.R.4th 987.

Modern trends as to contributory negligence of children. 32 A.L.R.4th 56.

Personal liability of public school teacher in negligence action for personal injury or death of student. 34 A.L.R.4th 228.

Liability of wharf owner or operator for personal injuries to invitees or licensees resulting from condition of premises or operation of equipment. 34 A.L.R.4th 572.

Personal liability of public school executive or administrative officer in negligence action for personal injury or death of student. 35 A.L.R.4th 272.

Personal liability in negligence action of public school employee, other than teacher or executive or administrative officer, for personal injury or death of student. 35 A.L.R.4th 328.

Liability for injury to customer or other invitee of retail store by falling of displayed, stored, or piled objects. 61 A.L.R.4th 27.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors. 71 A.L.R.4th 1108.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 A.L.R.4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 A.L.R.4th 538.

Rescue Doctrine: applicability and application of comparative negligence principles. 75 A.L.R.4th 875.

Modern status of rule imputing motor vehicle driver’s negligence to passenger on joint venture theory. 3 A.L.R.5th 1.

Comparative negligence: judgment allocating fault in action against fewer than all potential defendants as precluding subsequent action against parties not sued in original action. 4 A.L.R.5th 753.

Applicability of comparative negligence doctrine to actions based on negligent misrepresentation. 22 A.L.R.5th 464.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 A.L.R.5th 467.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages. 52 A.L.R.5th 1.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim. 69 A.L.R.5th 625.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 83 A.L.R.5th 589.

Contributory Negligence or Comparative Negligence Based on Failure of Patient to Follow Instructions as Defense in Action Against Physician or Surgeon For Medical Malpractice. 84 A.L.R.5th 619.

Am. Jur.

22A Am. Jur. 2d, Death §§ 76- 81.

57A Am. Jur. 2d, Negligence §§ 256-419.

18 Am. Jur. Pl & Pr Forms (Rev), Negligence, Forms 291, 292 (Instruction to jury defining comparative negligence).

18 Am. Jur. Pl & Pr Forms (Rev), Negligence, Forms 293, 294 (Instruction to jury as to comparative negligence of multiple defendants).

21 Am. Jur. Trials, Trial of a Personal Injury Case in a Comparative Negligence Jurisdiction, §§ 1 et seq.

35 Am. Jur. Trials 349, The Seatbelt Defense.

20 Am. Jur. Proof of Facts 2d 667, Contributory Negligence of Passenger Accepting Ride With Driver Suffering from Drowsiness, Illness, or Physical Defects.

49 Am. Jur. Proof of Facts 2d 191, Damages for Wrongful Death of Child.

49 Am. Jur. Proof of Facts 2d 379, Strict Products Liability: Misuse of Product.

3 Am. Jur. Proof of Facts 3d 71, The Seatbelt Defense.

CJS.

25A C.J.S., Death §§ 211–220.

65 C.J.S., Negligence §§ 253-329.

Law Reviews.

Spell, Stemming the tide of expanding liability; the coexistence of comparative negligence and assumption of risk. 8 Miss. C. L. Rev. 159, Spring, 1988.

Twyner, A Survey and Analysis of Comparative Fault in Mississippi. 52 Miss. L.J. 563, September 1982.

Wade, Multiple Tortfeasor Liability in Products Liability Suits. 55 Miss. L. J. 683, December 1985.

Comment, Fair Apportionment of Fault Among Joint Tortfeasors – A Mississippi Perspective. 55 Miss. L. J. 709, December 1985.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, Spring, 1997.

Practice References.

1 Am Law Prod Liab 3d, Overview of Products Liability Law § 1:81.

3 Am Law Prod Liab 3d, Contributory Negligence; Comparative Fault § 40:26.

§ 11-7-17. Questions of negligence and contributory negligence for jury.

All questions of negligence and contributory negligence shall be for the jury to determine.

HISTORY: Codes, Hemingway's 1917, § 503; 1930, § 512; 1942, § 1455; Laws, 1910, ch. 135; Laws, 1920, ch. 312.

Cross References — Presumption of negligence for injury by railroads and motor vehicles, see § 13-1-123.

Liability of railroad company for negligence and mismanagement, see § 77-9-435.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Negligence generally.
3. Proximate cause.
4. Contributory negligence.
5. Comparative negligence and apportionment of damages.
6. Instructions.

1. In general.

Jury verdict defied all logic, as the evidence presented at trial established that the driver was negligent as a matter of law for failing to maintain a proper lookout and to yield the right-of-way by executing a turn across the insured's lane of travel. A verdict should have been returned in favor of the insured because the violation of said statutory duties by the driver was the unequivocal proximate cause of the insured's injury; even if the driver was not negligent per se, the facts presented at trial unconditionally demonstrated that the collision was the result of her negligence and the trial court committed reversible error in failing to apply Miss. R. Civ. P. 50, and by denying the insured's motion for judgment notwithstanding the verdict. State Farm Auto Ins. Cos. v. Davis, 887 So. 2d 192, 2004 Miss. App. LEXIS 1065 (Miss. Ct. App. 2004).

On a motion for judgment notwithstanding the verdict, the trial court, under § 11-7-17 and Miss. Const. Art. 3 § 31, must consider all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, and if the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable men could not have arrived at a contrary verdict, granting the motion is proper, but if there is substantial evidence opposed to the motion, such that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and it is no answer to say that the jury's verdict involves speculation or conjecture. City of Jackson v. Locklar, 431 So. 2d 475, 1983 Miss. LEXIS 2608 (Miss. 1983).

In an action by the owner of an automobile for damages arising out of the theft of the vehicle while it was in the possession of a bailee for hire, the trial court properly refused to grant a directed verdict, peremptory instruction or judgment n.o.v. in favor of the bailee where a question of negligence existed over the bailee's leaving the vehicle, with the keys placed above the sun visor, on a public street exposed to possible theft for one hour and five minutes. City of Meridian v. Webb, 387 So. 2d 85, 1980 Miss. LEXIS 2038 (Miss. 1980).

The violation of a traffic law or safety statute may constitute negligence as a matter of law, but in order to capitalize on the violation of a safety statute by a defendant, the plaintiff must establish, in addition to a causal relation between the violation of the statute and the harm suffered, that he is one of the class of persons which the statute was intended to protect, and that the harm suffered was of the kind the statute was designed to prevent, or in other words that the harm suffered resulted from the type of risk covered by the statute. U-Haul Co. v. White, 232 So. 2d 705, 1970 Miss. LEXIS 1635 (Miss. 1970).

A court should not, by its decree, fail to give effect to the statute. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

In litigation, growing out of death and injuries sustained in a collision of two automobiles, filed in the chancery court in the county where letters of administration on the decedent's estates were issued, complainants charged that the accident was due to the negligence of a construction company, through its agent, in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, where, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of Mississippi Constitution § 147, and while the chancery court in his discretion might have directed the trial of the case by jury, error could not be predicated upon the refusal of a jury trial. Mathews v. Thompson, 231 Miss. 258, 95 So. 2d 438, 1957 Miss. LEXIS 512 (Miss. 1957).

This provision is not binding in a Federal court. Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928, 1934 U.S. App. LEXIS 5027 (5th Cir. Miss. 1934).

This provision does not have the effect in a Federal court of making it erroneous for the court to direct a verdict where the evidence is such that a verdict the other way would be set aside. Blass v. Virgin Pine Lumber Co., 50 F.2d 29, 1931 U.S. App. LEXIS 4398 (5th Cir. Miss. 1931).

This section [Code 1942, § 1455] does not apply in the trial of a matter of purely equity jurisdiction. Boyd v. Applewhite, 121 Miss. 879, 84 So. 16, 1920 Miss. LEXIS 128 (Miss. 1920).

2. Negligence generally.

In an action on behalf of an infant by her parents for injuries sustained by the child when the driver of an automobile drove over her while leaving a parking space in front of the child's parents' home, the trial court properly declined to give a peremptory instruction on liability favorable to the parents where the evidence, when viewed in a light most favorable to the verdict, portrayed circumstances from which reasonable minds could find that the driver had afforded the infant all of the care which was due under the circumstances, including the presence of her parents in the immediate vicinity, and where the evidence did not establish as a matter of law that the driver had violated the duty imposed by statute to "exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway." Haver v. Hinson, 385 So. 2d 605, 1980 Miss. LEXIS 2018 (Miss. 1980).

Questions of negligence are for the jury's determination. Where, however, there is no issue of fact, then the court determines the negligence question. McGee v. Bolen, 369 So. 2d 486, 1979 Miss. LEXIS 2255 (Miss. 1979).

In action against bank for having negligently lost deposit made by plaintiff, the issue as to whether or not the bank exercised reasonable care in finding the lost deposit was a question for the determination of the jury. First Nat'l Bank v. Langley, 314 So. 2d 324, 1975 Miss. LEXIS 1678 (Miss. 1975).

Where plaintiff's case was based on the negligence of defendant and the only answer of defendant was an affirmative defense, the county court erred in disposing of the case at a preliminary hearing on the motion to dismiss, thereby denying plaintiff the right to present his case to the jury on the facts. Gates v. Owen Chevrolet Co., 294 So. 2d 179, 1974 Miss. LEXIS 1818 (Miss. 1974).

All questions of negligence and contributory negligence are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. Smith v. Walton, 271 So. 2d 409, 1973 Miss. LEXIS 1507 (Miss. 1973).

Where the evidence showed that the defendant's vision, as she approached a smoke covered portion of the highway, slowing her automobile to approximately 30 miles per hour was restricted to approximately one and one-half car lengths in front of her automobile, it was never entirely obscured, the question of the defendant's negligence in colliding with another vehicle traveling in the opposite direction in defendant's lane while passing another vehicle was for the jury, precluding a peremptory instruction as to defendants liability in a suit for personal injuries. Butler v. Chrestman, 264 So. 2d 812, 1972 Miss. LEXIS 1366 (Miss. 1972).

When a motorist is driving at a reasonable rate of speed and is obeying the rules of the road, he is not liable for injuries to a child who darts out from behind a fence or a parked or stopped vehicle so suddenly that the motorist cannot stop or otherwise avoid injuring the child. Dorrough v. State, 245 So. 2d 188, 1971 Miss. LEXIS 1356 (Miss. 1971).

In an action by a passenger against the defendant of an automobile for personal injuries sustained when the driver lost control of the automobile on a curve, evidence as to the driver's intoxicated condition and touching on the question of assumption of the risk by the passenger, presented an issue for the jury. Griffin v. Holliday, 233 So. 2d 820, 1970 Miss. LEXIS 1684 (Miss. 1970).

Assumption of the risk as a complete defense to an action for negligence is a viable doctrine in Mississippi in cases other than master and servant relationships, and ordinarily its application is for the trier of fact. Wright v. Standard Oil Co., 319 F. Supp. 1364, 1970 U.S. Dist. LEXIS 9331 (N.D. Miss. 1970), rev'd, 470 F.2d 1280, 1972 U.S. App. LEXIS 6335 (5th Cir. Miss. 1972).

Where a father did not have a conscious purpose or intention that his son should recross a highway unattended and be exposed to known danger in so doing, and had no actual knowledge of negligent vehicular operation by third parties which would increase the danger to his child beyond that posed by ordinary traffic hazards, it could not be said that he assumed the risk of the child's injury under Mississippi law. Wright v. Standard Oil Co., 319 F. Supp. 1364, 1970 U.S. Dist. LEXIS 9331 (N.D. Miss. 1970), rev'd, 470 F.2d 1280, 1972 U.S. App. LEXIS 6335 (5th Cir. Miss. 1972).

In an action for injuries by one injured by an elevator while on defendant's premises for the purpose of installing equipment, the defendant's motion for judgment notwithstanding the verdict should have been sustained where the plaintiff failed to establish a causal connection between any defect in the elevator and the plaintiff's injury, and thus there was no issue for the jury's determination. General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 1969 Miss. LEXIS 1491 (Miss. 1969).

Where defendant driver of overtaken truck permitted his vehicle to drift across the centerline and speeded up when plaintiff attempted to pass on the left, the evidence was sufficient to raise a jury question on the issue of the truckdriver's negligence. Lewis Grocery Co. v. Blackwell, 209 So. 2d 639, 1968 Miss. LEXIS 1465 (Miss. 1968).

Code 1942, § 8215 should be construed in a practical manner, and it does not mean that a motorist forced to stop momentarily upon the paved portion of a highway because the vehicle in front of him stopped and oncoming traffic prevented him from passing is guilty of negligence in not immediately driving from the highway onto the shoulder. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

The legislature has adopted, as a statutory policy, the general rule that the issue of negligence and contributory negligence are to be determined by the jury, and ordinarily such issues should not be disposed of by the court in a peremptory manner. De Laughter v. Womack, 250 Miss. 190, 164 So. 2d 762, 1964 Miss. LEXIS 455 (Miss. 1964).

A jury's verdict for defendants may not be set aside because the evidence was sharply conflicting and the credibility of a witness was open to question. Gaskin v. Davis, 246 Miss. 166, 149 So. 2d 850, 1963 Miss. LEXIS 432 (Miss. 1963).

Evidence warranted jury in automobile collision case in finding negligence and contributory negligence. Hawkins v. Hillman, 245 Miss. 385, 149 So. 2d 17, 1963 Miss. LEXIS 526 (Miss. 1963).

Negligence in turning a corner rapidly into the entrance of a building while pushing a heavy hand cart, at a time and place where collision with a pedestrian might reasonably have been foreseen, is for the jury. Dr. Pepper Bottling Co. v. Bruner, 245 Miss. 276, 148 So. 2d 199, 1962 Miss. LEXIS 552 (Miss. 1962).

In bowler's action to recover for damages for injuries sustained in fall allegedly due to the negligence of the bowling establishment proprietor, questions as to assumption of risks and contributory negligence should have gone to jury under proper instructions. Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 146 So. 2d 558, 1962 Miss. LEXIS 543 (Miss. 1962).

In an action for damages predicated upon the negligence of an electrical power company in failing to cut off electric power after it had notice that eight of plaintiff's cows had been electrocuted by a fallen wire, defenses suggesting that, since plaintiff could not possibly eat the flesh of eight cows, it was his intention to prepare the carcasses for illegal sale to the public for food, and also alleging that the power company had remedied the dangerous situation almost immediately, presented jury questions. King v. Mississippi Power & Light Co., 244 Miss. 486, 142 So. 2d 222, 1962 Miss. LEXIS 469 (Miss. 1962).

The operator of an airplane may be found to have been negligent where his take-off from a pasture in which he had landed caused the cattle grazing therein to stampede. Brunt v. Chicago Mill & Lumber Co., 243 Miss. 607, 139 So. 2d 380, 1962 Miss. LEXIS 384 (Miss. 1962).

Negligence and contributory negligence are jury questions. Louisville & N. R. Co. v. Price, 243 Miss. 99, 137 So. 2d 787, 1962 Miss. LEXIS 319 (Miss. 1962).

A verdict on conflicting evidence in a negligence case will be set aside only if clearly against the weight of evidence or influenced by passion, prejudice or corruption. Schumpert v. Watson, 241 Miss. 199, 129 So. 2d 627, 1961 Miss. LEXIS 332 (Miss. 1961), overruled in part, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 1985 Miss. LEXIS 1942 (Miss. 1985).

Responsibility for collision of truck and bus which entered intersection without stopping is for the jury. Greyhound Corp. v. Kindle, 240 Miss. 702, 128 So. 2d 567, 1961 Miss. LEXIS 500 (Miss. 1961).

Conflict of testimony as to the speed of a train presents a question for the jury. New Orleans & N. R. Co. v. Shows, 240 Miss. 604, 128 So. 2d 381, 1961 Miss. LEXIS 490 (Miss. 1961).

A typical jury question is presented where each party introduces evidence to show that the cause of an automobile collision was the negligence of the other. Ferguson v. Denton, 239 Miss. 591, 124 So. 2d 279, 1960 Miss. LEXIS 327 (Miss. 1960).

In an action for personal injuries sustained by a plaintiff when his automobile was struck from the rear by the defendant's automobile, where the evidence presented jury questions as to whether the defendant was negligent in driving at an excessive speed, or following another vehicle too closely, or in failing to have his vehicle under proper control, or whether the sole proximate cause of the collision was the manner in which the plaintiff's vehicle was driven into the intersection, the trial court erred in directing a verdict for plaintiff on the issue of liability. Buntyn v. Robinson, 233 Miss. 360, 102 So. 2d 126, 1958 Miss. LEXIS 391 (Miss. 1958).

In an action for personal injuries and property damages arising out of a collision between plaintiff's automobile and that of the defendant when defendant allegedly drove, without stopping, from a private driveway into the highway upon which plaintiff was proceeding in such manner that plaintiff could not avoid striking him, conflicting evidence raised jury questions as to defendant's negligence, and whether his negligence was the proximate cause of the accident. Stewart v. Madden, 233 Miss. 206, 101 So. 2d 353, 1958 Miss. LEXIS 372 (Miss. 1958).

In a wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year old child upon the highway, jury's verdict for defendant was against the overwhelming weight of the evidence where it appeared that the road in the vicinity of the accident was straight and defendant's view was entirely unobstructed, and the defendant testified that he had seen the boy on the bicycle for a distance of several hundred feet before overtaking him, and yet had neither sounded his horn nor applied his brakes until he was within 12 or 15 feet of the boy, when it was too late to avoid hitting him. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

Upon a motion for a directed verdict, all the facts testified to, and all inferences necessarily and logically to be deduced therefrom, are to be taken as true in favor of the party against whom the motion is asked, and the case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery could be had upon any view which could be properly taken of the facts which the evidence tends to establish; but if more than one reasonable inference can be garnered from the facts, the question of negligence is for the jury. Mock v. Natchez Garden Club, 230 Miss. 377, 92 So. 2d 562, 1957 Miss. LEXIS 380 (Miss. 1957).

In an action by parents to recover for the death of their son who, while swimming at nighttime, drowned in defendant's swimming pool which had been engaged by a church group, evidence as to the adequacy of the lighting at the swimming pool and the possible negligence of the defendant's life guard raised questions for the jury as to defendant's liability, and the trial court erred in peremptorily directing a jury verdict for defendant. Mock v. Natchez Garden Club, 230 Miss. 377, 92 So. 2d 562, 1957 Miss. LEXIS 380 (Miss. 1957).

Where a case turns upon circumstantial evidence it should rarely be taken from the jury. Cameron v. Hootsell, 229 Miss. 80, 90 So. 2d 195, 1956 Miss. LEXIS 588 (Miss. 1956).

In an action against a lumber company for injuries sustained when plaintiff was struck by a piece of lumber which allegedly fell off the lumber company's truck while plaintiff was walking along the side of the street at a point where there were no sidewalks, circumstantial evidence presented questions of fact for jury's determination as to whether the truck in question was that of the lumber company, and was being negligently operated on the occasion in question by the servant or agent of the lumber company acting within the scope of his employment, and in furtherance of his master's business. Cameron v. Hootsell, 229 Miss. 80, 90 So. 2d 195, 1956 Miss. LEXIS 588 (Miss. 1956).

In an action for injuries incurred by plaintiff bicyclist when, approaching defendant's truck from rear, he tried to pass it at an intersection, was hit by the truck as it also started to turn right, and was catapulted in the pathway of another car, the degrees of negligence were for the jury to determine. Cochran v. Peeler, 209 Miss. 394, 47 So. 2d 806, 1950 Miss. LEXIS 404 (Miss. 1950).

This statute [Code 1942, § 1455] does not change fundamental condition that in action to recover for negligence there must be negligence, and without it, there is nothing for jury. Mississippi Butane Gas Systems, Inc. v. Welch, 208 Miss. 637, 45 So. 2d 262, 1950 Miss. LEXIS 280 (Miss. 1950).

In advertiser's action against publisher of newspaper for negligence in publishing advertisement that stock of clothing will be sold for greater discount than that intended by advertiser, it is for jury to say whether course followed by advertiser in selling at advertised price was so reasonable as to constitute foreseeable result of publisher's negligence, whether such course was made reasonable by conduct and assurance of publisher as to his responsibility or was result of advertiser's own independent judgment, and whether such judgment was exercised reasonably and without reasonably available mitigating alternative. Meridian Star v. Kay, 207 Miss. 78, 41 So. 2d 30, 1949 Miss. LEXIS 318 (Miss. 1949).

Danger and negligence are not synonymous, nor is the existence of a defect, of necessity, either danger or negligence. Ming v. Jackson, 202 Miss. 260, 31 So. 2d 900, 1947 Miss. LEXIS 269 (Miss. 1947).

In action by truck driver for oil company for injuries sustained while delivering fuel for defendant contractor's tractors and other machines located between levee and river when caught between oil truck and defendant's caterpillar tractor used in pulling the truck over the levee which suddenly rolled down the incline, whether the assistance intended to be given the plaintiff in attempting to pull the truck over the levee was in the course of the defendant's business or merely an act of unselfish generosity, whether the caterpillar tractor had defective brakes or defective brake-locks which caused the tractor to roll against the plaintiff, and, if so, whether such defects amounted to failure on defendant's part to exercise reasonable care for plaintiff's safety, were questions for the jury. Sugg v. Hendrix, 153 F.2d 240, 1946 U.S. App. LEXIS 1906 (5th Cir. Miss. 1946).

3. Proximate cause.

In a wrongful death action arising out of a collision between an automobile in which decedent was riding and defendant's train at a railroad crossing on a foggy night, under conflicting evidence, the question of whether the alleged negligence of the railroad company in blocking the crossing for a period of more than five minutes, in violation of Code 1942, § 7780, was the effective cause of the accident, or whether the accident was due solely to the negligence of the driver of the car, was for the jury. Green v. Gulf, M. & O. R. Co., 244 Miss. 211, 141 So. 2d 216, 1962 Miss. LEXIS 442 (Miss. 1962).

Since there was no substantial evidence of negligence on the part of the railroad, and the sole proximate cause of decedent's death was his failure to look and listen prior to driving his automobile onto the crossing in front of defendant's approaching train, judgment for plaintiff would be reversed and judgment entered in the Supreme Court for the railroad. Illinois C. R. Co. v. Smith, 243 Miss. 766, 140 So. 2d 856, 1962 Miss. LEXIS 406 (Miss. 1962).

Although motorist's failure to stop before attempting to cross railroad tracks was negligence contributing to the collision with a railroad switch engine, trial court properly refused railroad's requested peremptory instruction where the evidence presented questions for the jury as to whether the proximate cause of the collision was the failure of the railroad to ring the bell on its engine, or the negligence of the railroad's engineer in failing to stop the engine when the engineer saw that motorist's automobile was not going to stop. New Orleans & N. R. Co. v. Ready, 238 Miss. 199, 118 So. 2d 185, 1960 Miss. LEXIS 396 (Miss. 1960).

In an action against a driver by a share-the-expense guest for injuries allegedly sustained when the driver's automobile foot brake failed to function properly so that the automobile collided into the rear of another which had come to a stop, the question of whether the driver was negligent in failing to exercise such care, after her foot brake failed to work, as a reasonably prudent and capable driver would have used under the unusual circumstances to avoid an accident, and whether such negligence, if any, was the proximate cause of the guest's injury, were for the jury. Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333, 1958 Miss. LEXIS 396 (Miss. 1958).

In an action for personal injuries and property damages arising out of a collision between plaintiff's automobile and that of the defendant when defendant allegedly drove, without stopping, from a private driveway into the highway upon which plaintiff was proceeding in such manner that plaintiff could not avoid striking him, conflicting evidence raised jury questions as to defendant's negligence, and whether his negligence was the proximate cause of the accident. Stewart v. Madden, 233 Miss. 206, 101 So. 2d 353, 1958 Miss. LEXIS 372 (Miss. 1958).

Where a motorist approaching an intersection with the signal lights flashing red in her direction, failed to stop before entering therein, the court properly submitted to the jury the issue of whether such negligence was the sole cause of the collision. Bates v. Walker, 232 Miss. 804, 100 So. 2d 611, 1958 Miss. LEXIS 333 (Miss. 1958).

In an action for the death of an eight-year-old child killed when struck by a large diesel trailer truck which was not equipped with service brakes, jury questions were presented, under conflicting evidence, as to whether the truck driver was negligent in driving at a speed in excess of 45 miles an hour, in failing to maintain a proper lookout and observing the movements of a child crossing the highway in time to avoid injuring her, in failing to maintain proper control of his vehicle after he saw or, by the exercise of reasonable care, should have seen the child on the highway, and the driver's negligence, if any, was the proximate or contributing cause of the death of the child. Reed v. State, 232 Miss. 432, 99 So. 2d 455, 1958 Miss. LEXIS 290 (Miss. 1958).

In an action against a railroad and its engineer for damages to a tractor trailer caused by a crossing collision, where the evidence established that the railroad and its engineer was liable as a matter of law, but also raised jury questions as to the contributory negligence, if any, of the truck driver, whether under the comparative negligence statute plaintiff's damages sustained should have been diminished, whether the negligence of the engineer was the sole, proximate cause of the collision, and the applicability of the last clear chance doctrine, the case was reversed and remanded for submission to a jury on issues of damages alone. New Orleans & N. R. Co. v. Dixie Highway Express, Inc., 230 Miss. 92, 92 So. 2d 455, 1957 Miss. LEXIS 348 (Miss. 1957).

In an action by a farm equipment mechanic, employed by defendant, to recover for injuries sustained when the arms of the defendant's cotton picker flew up crushing his right arm, where it appeared that before the plaintiff had arrived at the farm the defendant had taken the head off of the cotton picker, without releasing the tension, leaving the machine in a dangerous condition to be worked on, it was for the jury to determine whether the defendant should have told the plaintiff that the tension had not been released, and whether his failure to apprise plaintiff of that fact constituted negligence, which proximately caused or contributed to plaintiff's injury. Cole v. Tullos, 228 Miss. 815, 90 So. 2d 32, 1956 Miss. LEXIS 569 (Miss. 1956).

In an action by a bicyclist against a cab company for injuries suffered when he jumped off the bicycle to avoid being crushed by the cab against a van type truck ahead, the question of excessive speed of the cab and the proximate cause of the negligence was for the jury. Coker v. Five-Two Taxi Service, Inc., 211 Miss. 820, 52 So. 2d 356, 1951 Miss. LEXIS 412 (Miss. 1951).

It is for jury to determine whether defendant's negligence in not raising trap door over train steps so as to permit plaintiff to alight from bottom step was direct, contributing cause of plaintiff's injuries, where plaintiff had assisted passenger aboard train and those in charge of train permitted plaintiff to alight while train was moving. McClellan v. Illinois C. R. Co., 204 Miss. 432, 37 So. 2d 738, 1948 Miss. LEXIS 379 (Miss. 1948).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high voltage wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power, or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

The negligence of the defendant complained of must be the proximate cause of the injury. Hines v. Moore, 124 Miss. 500, 87 So. 1 (Miss. 1921).

4. Contributory negligence.

In a product liability suit, evidence of plaintiff's alcohol and drug use before riding an all-terrain vehicle (ATV), even though he was not legally intoxicated when he was hurt in an ATV accident, was not subject to exclusion on a motion in limine because it was relevant to the issue of contributory negligence, which was a jury question under Miss. Code Ann. § 11-7-17. Fife v. Polaris Indus., Inc., 2008 U.S. Dist. LEXIS 9882 (S.D. Miss. Jan. 15, 2008).

A plaintiff in a personal injury action was not entitled to an additur under § 11-1-55 to increase a $2,000 damages award, even though the plaintiff had introduced medical bills incurred in the treatment of his injuries which totalled $2,085.90 and he claimed that the jury had failed to consider his claims for pain, suffering and lost wages, where it was apparent that the jury believed that the plaintiff was somewhat responsible for his own injuries and accordingly reduced his award of damages to the amount of $2,000; a determination that the jury was incorrect in assessing the plaintiff's contributory negligence would be tantamount to holding that a jury is to be instructed that it must return a verdict for all alleged damages, which is not a proper statement of the law. Leach v. Leach, 597 So. 2d 1295, 1992 Miss. LEXIS 217 (Miss. 1992).

In medical malpractice case, court may not remove issue of contributory negligence from consideration of jury where defendant physician has introduced proof that patient did not seek follow-up treatment and had been neglectful of patient's physical condition. Reikes v. Martin, 471 So. 2d 385, 1985 Miss. LEXIS 2101 (Miss. 1985).

Where on a new trial, granted because of an erroneous instruction on contributory negligence, damages alone should be submitted to the jury, but the defendant may assert, in diminution of damages, any negligence on the part of plaintiff's decedent which can be shown to have contributed to the injuries sustained by the decedent. Glover v. Daniels, 310 F. Supp. 750, 1970 U.S. Dist. LEXIS 12400 (N.D. Miss. 1970).

In an action for injuries sustained by a trucker when his truck overturned, the question whether a fishery manager's negligence in directing the truck to be driven on a wet levee was superseded by the plaintiff's negligence, in undertaking to dump his truck there, was for the jury. Daves v. Reed, 222 So. 2d 411, 1969 Miss. LEXIS 1536 (Miss. 1969).

In an action for injuries sustained by a trucker when his truck overturned, the question as to whether the trucker fully appreciated the danger involved in driving his truck on a wet levee, and voluntarily assumed the consequences of his actions, was for the jury. Daves v. Reed, 222 So. 2d 411, 1969 Miss. LEXIS 1536 (Miss. 1969).

The fact that the plaintiff motorist may have been guilty of considerable contributory negligence does not per se bar him from the right of recovery. Lewis Grocery Co. v. Blackwell, 209 So. 2d 639, 1968 Miss. LEXIS 1465 (Miss. 1968).

The fact that the plaintiff was guilty of contributory negligence does not per se make the verdict of the jury contrary to the overwhelming weight of the evidence, assuming that the defendant was negligent. Philco Distributors, Inc. v. Herron, 195 So. 2d 473, 1967 Miss. LEXIS 1441 (Miss. 1967).

The legislature has adopted, as a statutory policy, the general rule that the issue of negligence and contributory negligence are to be determined by the jury, and ordinarily such issues should not be disposed of by the court in a peremptory manner. De Laughter v. Womack, 250 Miss. 190, 164 So. 2d 762, 1964 Miss. LEXIS 455 (Miss. 1964).

In an action for damages resulting when defendant's truck-trailer unit ran into the rear end of plaintiff's truck-trailer unit on the curved portion of the highway, the court did not err in refusing to charge the defendant's driver with negligence in respect to speeding, overtaking on the right, and following too closely, particularly in view of this section [Code 1942, § 1455]. Green Truck Lines, Inc. v. Hooper, 233 Miss. 794, 103 So. 2d 443, 1958 Miss. LEXIS 441 (Miss. 1958).

In an action by an owner of a truck against a corporation for damages for property and personal injuries arising out of an accident allegedly caused by the negligence of the corporation's agent in blocking a temporary bypass with his automobile and another that he had been towing, the question of whether the truck owner was negligent in failing to stop prior to the accident when he was blinded, or almost blinded, by the lights of the agent's car, was for the jury. Commercial Credit Corp. v. Smith, 231 Miss. 574, 96 So. 2d 911, 1957 Miss. LEXIS 539 (Miss. 1957).

In an action for personal injuries sustained by plaintiff when the pickup truck which he was driving collided with a bus which was parked one-half thereof on a paved portion of highway to discharge passenger, where evidence showed that it was raining and visibility was poor and that the plaintiff was traveling only about twenty-five or thirty miles per hour and that the lights on the bus were so dim that the plaintiff could not see them until he was within twenty-five or thirty feet of the bus, the question of contributory negligence is for the jury to determine. Continental Southern Lines, Inc. v. Williams, 226 Miss. 624, 85 So. 2d 179, 1956 Miss. LEXIS 440 (Miss. 1956).

Code 1930, §§ 511 and 512, (Code 1942, §§ 1454 and 1455) abolished contributory negligence as a defense and makes negligence and contributory negligence questions for the jury to determine. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

Whether motorist whose automobile struck a gondola car spotted by railroad employees so that it extended partly across public highway was contributorily negligent held for jury. Magers v. Okolona, H. & C. C. R. Co., 174 Miss. 860, 165 So. 416, 1936 Miss. LEXIS 201 (Miss. 1936).

By reason of this provision (Hemingway's Code 1917, § 503), it is proper to refuse a charge that a defendant is not liable if the plaintiff is guilty of contributory negligence. Reynolds-West Lumber Co. v. Kellum, 19 F.2d 72, 1927 U.S. App. LEXIS 2188 (5th Cir. Miss. 1927).

5. Comparative negligence and apportionment of damages.

A personal injury case would be reversed and remanded for trial in order for the jury to find liability, if any, under the comparative negligence principles of § 11-7-17 where it was apparent from the lower court's order granting summary judgment that the court found the existence of an "open and obvious" danger in making its determination, since the "open and obvious" defense has been abolished. Baptiste v. Jitney Jungle Stores of Am., 651 So. 2d 1063, 1995 Miss. LEXIS 122 (Miss. 1995).

The "open and obvious" defense to negligence actions would be abolished, and damages would be determined through application of the true comparative negligence doctrine; thus, a trial judge erred in construing the open and obvious defense as a complete bar to the recovery of damages, since it should only be used to mitigate damages on a comparative negligence basis under § 11-7-15. Tharp v. Bunge Corp., 641 So. 2d 20, 1994 Miss. LEXIS 358 (Miss. 1994).

Under this jurisdiction's comparative negligence statute, it is for the jury to decide not only all questions of negligence, but also whether it will diminish the damages in proportion to the amount of the negligence attributable to the plaintiff, even if no instruction to this effect is requested by either party. Medley v. Carter, 234 So. 2d 334, 1970 Miss. LEXIS 1407 (Miss. 1970).

The evidence created a question for the jury as to the comparative negligence of a westbound motorist whose vehicle came to rest in the center of the highway after colliding with an oncoming motorist, and an eastbound motorist who collided with the vehicle shortly after the first collision, and the trial judge erred in setting aside the jury verdict and rendering a judgment notwithstanding the verdict for the westbound motorist. Medley v. Carter, 234 So. 2d 334, 1970 Miss. LEXIS 1407 (Miss. 1970).

Where two Mississippi motorists were killed in an automobile collision which occurred in Louisiana, their estates were being administered in Mississippi, and their administratrices had respectively filed in a Mississippi court an action and counterclaim for damages as a consequence of the deaths of the decedents, the issues of liability under both the declaration and counterclaim should have been submitted to the jury by appropriate instructions under the Mississippi comparative negligence statute, despite the fact that the law of Louisiana, where the fatal collision occurred, barred a recovery where contributory negligence is established. Mitchell v. Craft, 211 So. 2d 509, 1968 Miss. LEXIS 1266 (Miss. 1968).

Although the defendant in a wrongful death action did not ask for or receive an instruction on contributory negligence, the jury had the right to apply the comparative negligence statute without an instruction to that effect. Winstead v. Hall, 251 Miss. 800, 171 So. 2d 354, 1965 Miss. LEXIS 904 (Miss. 1965).

Damages for personal injury will not be held grossly inadequate where jury, in determining amount, may have found contributory negligence. Ramsey v. Price, 249 Miss. 192, 161 So. 2d 778, 1964 Miss. LEXIS 385 (Miss. 1964).

Where there is evidence warranting the jury in finding contributory negligence, an appellate court may not set aside a verdict on the ground of inadequacy of damages. Gore v. Patrick, 246 Miss. 715, 150 So. 2d 169, 1963 Miss. LEXIS 497 (Miss. 1963).

Question of the extent to which recovery for negligence is reduced by the injured person's contributory negligence is for the trier of the facts. Illinois C. R. Co. v. Williams, 242 Miss. 586, 135 So. 2d 831, 1961 Miss. LEXIS 595 (Miss. 1961).

On a retrial of a negligence action on the issue of damages alone, the evidence should not be limited to the question of damages, but facts should be presented as to the negligence of all the parties, and the jury could apportion damages under the comparative negligence statute. Jenkins v. Cogan, 238 Miss. 543, 119 So. 2d 363, 1960 Miss. LEXIS 438 (Miss. 1960); Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

It is for the jury to decide whether it will diminish the damages in proportion to the amount of negligence attributable to the plaintiff when under all the testimony and circumstances thereby shown a part of the negligence contributing to plaintiff's injuries was attributable to his own negligence, even if no instruction to this effect is requested by either party. Mutual Life Ins. Co. v. Rather, 221 Miss. 527, 73 So. 2d 163, 1954 Miss. LEXIS 559 (Miss. 1954).

In an action for injuries sustained by plaintiff who was struck by an automobile while standing on the shoulder of a highway waiting for a ride, a finding that the plaintiff had stepped into the highway in front of an automobile was not supported by evidence and therefore did not warrant the jury in employing the comparative negligence doctrine, and a new trial would be granted on the issue of damages alone when all the facts should be presented to the jury on the question of negligence and the jury will have the right to apportion the damages under the comparative negligence statute. Vaughan v. Bollis, 221 Miss. 589, 73 So. 2d 160, 1954 Miss. LEXIS 567 (Miss. 1954).

In a proceeding on libel for collision, damages would be apportioned equally in a case where both parties had been at fault to the extent of twenty per cent and eighty per cent. In re Adams, 125 F. Supp. 110, 1954 U.S. Dist. LEXIS 2632 (D.N.Y. 1954), aff'd, 237 F.2d 884, 1956 U.S. App. LEXIS 4743 (2d Cir. N.Y. 1956).

6. Instructions.

In an action by an employee against his employer arising from an on-the-job injury, the trial court properly granted the employee peremptory instructions on contributory negligence and assumption of the risk, even though § 11-7-17 provides that "all questions of negligence and contributory negligence shall be for the jury to determine," where there was no proof indicating that any potential negligence or assumption of the risk by the employee led to the injury. Vicksburg v. Young, 616 So. 2d 883, 1992 Miss. LEXIS 779 (Miss. 1992).

When there is evidence to support a comparative negligence instruction, it is not error to give the instruction even though each party may contend that the other was entirely at fault. Pham v. Welter, 542 So. 2d 884, 1989 Miss. LEXIS 148 (Miss. 1989).

In an action for damages arising out of an automobile collision in which the plaintiff's car was struck by that of the defendant, the trial court erred in giving a preemptory instruction that the plaintiff had been guilty of negligence in failing to keep a reasonable lookout to the rear of her vehicle before turning off a highway where the plaintiff's testimony about her actions prior to the collision raised a question of fact for the jury as to whether she had taken all reasonable precautions prior to making the turn. Kennedy v. Reed, 393 So. 2d 480, 1981 Miss. LEXIS 1915 (Miss. 1981).

In an action for personal injuries, an instruction that the driver of a pickup truck, which ran over a motorcyclist after he had been thrown to the highway following a collision with the defendant's automobile, was negligent in the operation of his truck, and if the jury believed from a preponderance of the evidence that the negligence of the truck driver contributed to the motorcyclist's injury, then the defendant was not responsible for such of the motorcyclist's injuries which were caused by the negligence of the truck-driver unless the jury should believe from a preponderance of the evidence that such negligence was foreseeable by the defendant, could not be construed as being in effect a peremptory instruction to find for the defendant. Ratliff v. Nail, 231 So. 2d 798, 1970 Miss. LEXIS 1611 (Miss. 1970).

It was erroneous to grant the "emergency instruction" where it raised an inference that if the driver of a truck had suddenly turned his vehicle across the center line into the left lane of the highway at the time when the defendant's bus was about to pass, that then the defendant was not guilty of contributory negligence in driving at an unlawful speed and approaching the truck at an unreasonable rate in an unreasonable manner. Peel v. Gulf Transport Co., 252 Miss. 797, 174 So. 2d 377, 1965 Miss. LEXIS 1148 (Miss. 1965).

Where facts constituting contributory negligence are pleaded and proved, a request to instruct on contributory negligence is not essential to enable the jury to consider it in assessing damages. Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194, 1964 Miss. LEXIS 382 (Miss. 1964).

Instruction in action for alleged negligent installation of machine that jury should find for defendant if they found that the machine was not being handled properly by plaintiff, held erroneous. Pevey v. Alexander Pool Co., 244 Miss. 25, 139 So. 2d 847, 1962 Miss. LEXIS 418 (Miss. 1962).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, court properly instructed that the truck driver was guilty of negligence, and that plaintiff could recover on account thereof, if such negligence was a proximate, contributing cause of the collision, which question was for the jury. City of Jackson v. Reed, 233 Miss. 304, 103 So. 2d 6, 1958 Miss. LEXIS 380 (Miss. 1958), overruled, City of Jackson v. Williamson, 740 So. 2d 818, 1999 Miss. LEXIS 89 (Miss. 1999).

Instruction permitting jury to consider plaintiff's contributory negligence, if any, in diminution of damages, where not pleaded, if error, held harmless where jury found plaintiff's negligence was sole proximate cause of injury. White v. Weitz, 169 Miss. 102, 152 So. 484, 1934 Miss. LEXIS 9 (Miss. 1934).

RESEARCH REFERENCES

ALR.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 A.L.R.4th 987.

Malpractice: Physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient. 47 A.L.R.5th 433.

Am. Jur.

22A Am. Jur. 2d, Death §§ 185- 216.

57A Am. Jur. 2d, Negligence § 66.

18 Am. Jur. Pl & Pr Forms (Rev), Negligence, Forms 291, 292 (Instruction to jury defining comparative negligence).

18 Am. Jur. Pl & Pr Forms (Rev), Negligence, Forms 293, 294 (Instruction to jury as to comparative negligence of multiple defendants).

CJS.

65A C.J.S., Negligence §§ 958-993.

Law Reviews.

1979 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 887, December 1979.

Twyner, A Survey and Analysis of Comparative Fault in Mississippi. 52 Miss. L.J. 563, September 1982.

Practice References.

3 Am Law Prod Liab 3d, Contributory Negligence; Comparative Fault § 40:7.

§ 11-7-18. Limitation of remedies or disclaimer of liability as to certain implied warranties in sale to consumer of consumer goods prohibited.

Except as otherwise provided in Sections 75-2-314, 75-2-315 and 75-2-719, there shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose in a sale to a consumer, as defined in Section 75-1-201(b)(11), of consumer goods, as defined in Section 75-9-102(a)(23). The provisions of this section may not be waived or varied by agreement.

HISTORY: Laws, 1976, ch. 385, § 3; Laws, 1998, ch. 513, § 5; Laws, 2010, ch. 506, § 1; Laws, 2014, ch. 312, § 5, eff from and after July 1, 2014.

Cross References — Similar statutory provision embodied in the Uniform Commercial Code, see § 75-2-719.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Preservation for review.

1. In general.

Miss. Code Ann. § 75-2-315.1 [repealed] is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used vehicle was sufficient to waive these warranties. Murray v. Blackwell, 966 So. 2d 901, 2007 Miss. App. LEXIS 705 (Miss. Ct. App. 2007).

Provision of contract for extermination of pests which limited homeowner's remedy for breach of express warranty to reinspection and refumigation in event of reinfestation, was enforceable under Mississippi law. Facts did not fall within protections afforded by §§ 11-7-18 or 75-2-315.1, and litigation not involve claim for breach of implied warranties. Moreover even if defendant had attempted to limit implied warranties, plaintiff did not seek remedies based thereon. In addition, contract was one primarily for service, whereas prohibition on limitation of express warranties applies only to manufacturer of consumer goods, thus there was nothing in Mississippi statutes forbidding limitation of remedies for breach of express warranty provided in service contract. Smith v. Orkin Exterminating Co., 791 F. Supp. 1137, 1990 U.S. Dist. LEXIS 19936 (S.D. Miss. 1990), aff'd, 943 F.2d 1314, 1991 U.S. App. LEXIS 21363 (5th Cir. Miss. 1991).

Implied warranty of merchantability may not be waived or disclaimed in Mississippi as result of §§ 11-7-18 and 75-2-719(4). Beck Enterprises, Inc. v. Hester, 512 So. 2d 672, 1987 Miss. LEXIS 2712 (Miss. 1987).

Heat pump manufacturer's attempt in its express limited warranty to limit its liability as to any implied warranty was invalid. Fedders Corp. v. Boatright, 493 So. 2d 301, 1986 Miss. LEXIS 2478 (Miss. 1986).

Mississippi Code § 11-7-18 does not create warranties; it saves warranties otherwise existing. Language in a copier-equipment lease disclaiming implied warranties of fitness for purpose and merchantability is rendered inoperative by Mississippi Code § 11-7-18. J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851, 1986 Miss. LEXIS 2460 (Miss. 1986).

2. Preservation for review.

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the homeowners' warranty claims were procedurally barred. The homeowners never, over the course of filing three complaints, pleaded claims for breach of implied or express warranty against the seller and that critical fact fundamentally distinguished the case from the warranty decisions relied upon by the homeowners. McKee v. Bowers Window & Door Co., 64 So. 3d 926, 2011 Miss. LEXIS 218 (Miss. 2011).

RESEARCH REFERENCES

ALR.

Validity of disclaimer of warranty clauses in sale of new automobile. 54 A.L.R.3d 1217.

Application of comparative negligence in action based on gross negligence, recklessness, or the like. 10 A.L.R.4th 946.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales). 38 A.L.R.4th 25.

Law Reviews.

Alldredge, Uniform Commercial Code – Should the U.C.C. furnish rules of decision in equipment leasing controversies? 7 Miss. C. L. Rev. 209, Spring, 1987.

§ 11-7-19. No assumption of risk by employee when the master is negligent; exception as to certain employees.

In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master. This rule shall not apply to conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them.

HISTORY: Codes, Hemingway's 1917, § 504; 1930, § 513; 1942, § 1456; Laws, 1914, ch. 156.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Assumption of risk; application.
3. Simple tool doctrine.
4. Conductors and engineers.
5. Knowledge of danger or defect, effect of.
6. Questions for jury.
7. Instructions.

1. In general.

Assumption of the risk is governed by the subjective standard of the plaintiff himself whereas contributory negligence is measured by the objective standard of a reasonable man. McMillan v. McMillan, 262 So. 2d 781, 1972 Miss. LEXIS 1325 (Miss. 1972).

The statute [Code 1942, § 1456] abolishes the assumption of risk only as between master and servant where the master is negligent, and does not abolish the assumption of risk by an independent contractor. United Roofing & Siding Co. v. Seefeld, 222 So. 2d 406, 1969 Miss. LEXIS 1533 (Miss. 1969).

Under Code 1942, § 1454, limiting application of contributory negligence, and under this section [Code 1942, § 1456], when negligence has once been shown on part of master followed by injury to servant, the only way master can entirely escape liability is to show his negligence was not a proximate cause of the injury or that the servant's own negligence, or negligence of fellow-servant, was the sole proximate cause of the plaintiff's injury. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

Where negligence of an employer is shown, this statute [Code 1942, § 1456] abolishes the defense of assumption of risk. Ingalls Shipbuilding Corp. v. Trehern, 155 F.2d 202, 1946 U.S. App. LEXIS 2188 (5th Cir. Miss. 1946).

The common-law principles touching liability of master and servant are in force in Mississippi, with slight modifications. Holliday v. Fulton Bank Mill, Inc., 142 F.2d 1006, 1944 U.S. App. LEXIS 3563 (5th Cir. Miss. 1944).

Under this statute [Code 1942, § 1456], assumption of the risk is not a defense to suits by employees. Montgomery Ward & Co. v. Lindsey, 104 F.2d 882, 1939 U.S. App. LEXIS 4249 (5th Cir. Miss. 1939).

Under this provision an employee does not assume the risk resulting from his employer's negligence. Southern Kraft Corp. v. Parnell, 65 F.2d 785, 1933 U.S. App. LEXIS 3157 (5th Cir. Miss. 1933).

Under this statute [Code 1942, § 1456], the doctrine of assumption of risk does not apply to risks of employment that are attributable in whole or in part to the employer's negligence. Motor Wheel Corp. v. Dodson, 23 F.2d 282, 1927 U.S. App. LEXIS 3180 (5th Cir. Miss. 1927).

This section [Code 1942, § 1456] abolishes the doctrine of the assumption of risks. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

The common-law doctrine of assumption of risk is in full force in Mississippi, except as between master and servant. McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395, 1937 Miss. LEXIS 91 (Miss. 1937).

2. Assumption of risk; application.

Where an employee knew by past experience with an animal that the horse had thrown employee on two previous occasions, and knew of the dangerous character of the horse, and the employer required the employee to ride the horse in connection with his work and in compliance the employee was injured by the horse, in suit for injuries sustained by the employee, he is not barred of recovery on the ground that he assumed the risk. Grillis v. Patrick, 214 Miss. 747, 59 So. 2d 341, 1952 Miss. LEXIS 516 (Miss. 1952).

It was the duty of the foreman of an ax crew when handling a highly dangerous explosive to use reasonable care to see to it that one working under him both heard and understood his warnings in due time to reach a place of reasonable safety. Hercules Power Co. v. Palmer, 30 So. 2d 804 (Miss. 1947).

An employer who permitted a woman to lift heavy bundles without assistance when it knew that she was unequal to the task through its own physician who examined the woman after she complained of severe pain and who did not disclose her condition to her was negligent within the purview of this statute [Code 1942, § 1456]. Blue Bell Globe Mfg. Co. v. Lewis, 200 Miss. 685, 27 So. 2d 900, 1946 Miss. LEXIS 339 (Miss. 1946).

A woman injured in the course of her employment which required that she lift heavy bundles did not assume the risk of that employment if she thought that she was physically fit, in spite of a previous hernia operation disclosed to her employer's physician on preemployment examination, and her fitness was approved by that physician. Blue Bell Globe Mfg. Co. v. Lewis, 200 Miss. 685, 27 So. 2d 900, 1946 Miss. LEXIS 339 (Miss. 1946).

Continuation at work by a woman injured while lifting heavy bundles after requesting assistance and being denied in words reasonably interpreted by a reasonable person as constituting a threat of discharge if she would not or could not lift the bundles without help did not constitute assumption of any risk of being strained. Blue Bell Globe Mfg. Co. v. Lewis, 200 Miss. 685, 27 So. 2d 900, 1946 Miss. LEXIS 339 (Miss. 1946).

Although a servant assumes the ordinary risks inherent in his work, he does not assume the risk of his master's negligence in not furnishing sufficient help to do the work which the servant is employed to do in concert with others. Herrin Motor Lines, Inc. v. Jarvis, 156 F.2d 276, 1946 U.S. App. LEXIS 2569 (5th Cir. Miss. 1946).

Master was not liable for injuries sustained by "off-bearer" on band-saw when a slab pinned him against the frame of the saw, where the danger out of which the injury arose grew out of the work itself and not because of any defect in the place of work or the master's machine, even though the sawyer may have been negligent, since the "off-bearer" assumed the risk of the work. Holliday v. Fulton Bank Mill, Inc., 142 F.2d 1006, 1944 U.S. App. LEXIS 3563 (5th Cir. Miss. 1944).

Master is not responsible for negligence of a fellow servant unless the former has in truth appointed the latter to see after some one of the master's absolute duties and the servant has failed therein. Holliday v. Fulton Bank Mill, Inc., 142 F.2d 1006, 1944 U.S. App. LEXIS 3563 (5th Cir. Miss. 1944).

Work around a band-saw mill is not so dangerous and complex as to require the making and enforcement of special rules by the master so as to render it reasonably safe. Holliday v. Fulton Bank Mill, Inc., 142 F.2d 1006, 1944 U.S. App. LEXIS 3563 (5th Cir. Miss. 1944).

Servant assumes the ordinary risks of the work he has undertaken, including the risk that his fellow servant may not always be careful. Holliday v. Fulton Bank Mill, Inc., 142 F.2d 1006, 1944 U.S. App. LEXIS 3563 (5th Cir. Miss. 1944).

This section [Code 1942, § 1456] deals alone with risks caused by the negligence of the master, not risks incident to the employment. Meridian Laundry Co. v. James, 190 Miss. 119, 195 So. 689, 1940 Miss. LEXIS 174 (Miss. 1940).

Injury sustained by laundry employee in charge of linen room allegedly from lifting twelve pound packages of linen to a shelf about five feet high was not the result of the employer's negligence, but was the result of the assumed hazards of the employment as to which this section [Code 1942, § 1456] has no application, and the employer's superintendent was justified in telling the employee, upon her complaint, that if she did not want to place the packages on such shelf, she could quit. Meridian Laundry Co. v. James, 190 Miss. 119, 195 So. 689, 1940 Miss. LEXIS 174 (Miss. 1940).

A direction by a section foreman to an employee to do the work in which the the injury occurred in which the foreman told him that he would lose his job if he did not do what he was told to do, relieved the employee from any assumption of the risk. Goss v. Kurn, 187 Miss. 679, 193 So. 783, 1940 Miss. LEXIS 240 (Miss. 1940).

Where an employee sustained injury while engaged with others in loading a box car with fertilizer, by reason of his loaded "buggy" being struck by that of another employee, such employee did not assume the risk, nor was the negligence of the fellow-servant chargeable to him, in view of the employer's negligence in ordering the particular work to be done in an unsafe and negligent manner and in depriving the servant of the only means known to him to protect himself from injury, the employer having ordered the employees to discontinue their method of having unloaded "buggy" wait until loaded "buggy" was placed in the car. Jefferson v. Virginia-Carolina Chemical Co., 184 Miss. 23, 185 So. 230, 1938 Miss. LEXIS 318 (Miss. 1938).

Where there was evidence showing that the falling beam which had injured an employee had fallen the week before from the same hoist, such employee did not assume the risk incident to its continued operation, if the employer was negligent in requiring its use. Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63, 1938 Miss. LEXIS 293 (Miss. 1938).

That employee voluntarily assisted in lifting mat did not preclude recovery for employer's negligence in not furnishing sufficient number of employees to move mat. Hardaway Contracting Co. v. Rivers, 181 Miss. 727, 180 So. 800, 1938 Miss. LEXIS 113 (Miss. 1938).

Bridge builder's employee, injured in fall from temporary bridge consisting of parallel stringers, did not, by using that undecked bridge, assume risk incident to its use, since servant assumes only dangers incident to service remaining after master has exercised reasonable care for servant's safety and does not assume risk of master's negligence in not furnishing reasonably safe place to work. Stricklin v. Harvey, 181 Miss. 606, 179 So. 345, 1938 Miss. LEXIS 101 (Miss. 1938).

Risk assumed by servant is danger incident to service which remains after master has exercised reasonable care for safety of servants. Gow Co. v. Hunter, 175 Miss. 896, 168 So. 264, 1936 Miss. LEXIS 82 (Miss. 1936).

Servant, who was ordered to catch and hold heavy machine which was being moved up embankment to ledge cut therein 25 or 30 feet above road level when block and tackle holding machine was released and machine slipped down, held not to have voluntarily assumed risk of injury therefrom, since he was then confronted with emergency with no time for thought or deliberation. Gow Co. v. Hunter, 175 Miss. 896, 168 So. 264, 1936 Miss. LEXIS 82 (Miss. 1936).

Employee held not precluded from recovering for injuries sustained when he was caused to fall thirty feet from trestle because of defect in rail over which hand car was being operated, on ground of assumption of risk. Randolph Lumber Co. v. Minchew, 172 Miss. 535, 159 So. 849, 1935 Miss. LEXIS 135 (Miss. 1935).

One operating cotton gin did not assume risk increased by employer's negligence. Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376, 1934 Miss. LEXIS 58 (Miss. 1934).

Employee at gasoline service station held not to have assumed risk of injury from stumbling over exposed air pipe. Standard Oil Co. v. Franks, 167 Miss. 282, 149 So. 798, 1933 Miss. LEXIS 134 (Miss. 1933).

Employee held not to assume risk of injury resulting from overexertion, when foreman, on threat of discharge, ordered him to do work alone, for which assistance was needed, since injury resulted from foreman's negligence. Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792, 1933 Miss. LEXIS 188 (Miss. 1933).

Employee, not under duty of inspecting machinery operated by him to see whether it is safe, does not assume risk of master's negligence; employee, not under duty of inspecting machinery operated by him, does not assume risk of negligence of another employee, whose duty it is to inspect. Planters' Oil Mill v. Wiley, 154 Miss. 113, 122 So. 365, 1929 Miss. LEXIS 117 (Miss. 1929).

3. Simple tool doctrine.

In action against employer for injuries sustained by employee while holding a short chisel which was being struck with heavy maul by helper, on ground that chisel, which foreman negligently required employee to use, was dangerous tool, employer was not entitled to directed verdict on ground that chisel and maul were simple tools and that employee assumed risk, since under statute servant does not assume risk where master is negligent. J. J. Newman Lumber Co. v. Cameron, 179 Miss. 217, 174 So. 571, 1937 Miss. LEXIS 21 (Miss. 1937).

The master is not relieved of liability for injury from use of unsafe tools, though servant may have been as competent as master to determine suitability thereof for performance of required work, where servant is bound to obey order or subject himself to discipline for insubordination, since statute abolishes doctrine of assumption of risk when master is negligent. J. J. Newman Lumber Co. v. Cameron, 179 Miss. 217, 174 So. 571, 1937 Miss. LEXIS 21 (Miss. 1937).

An automobile is not such a simple piece of machinery as to free the master from liability, but is a machine which the master must keep in a reasonable condition of safety, and this duty is nondelegable. Mississippi Utilities Co. v. Smith, 166 Miss. 105, 145 So. 896, 1933 Miss. LEXIS 330 (Miss. 1933).

The abolition of the doctrine of assumption of risk by employees does not affect the simple tool doctrine. Middleton v. National Box Co., 38 F.2d 89, 1930 U.S. Dist. LEXIS 1837 (D. Miss. 1930); Jones v. Southern United Ice Co., 167 Miss. 886, 150 So. 652, 1933 Miss. LEXIS 155 (Miss. 1933).

4. Conductors and engineers.

Engineer, directed against own judgment to clean locomotive with defective hose, held not to have assumed risk, statute not applying. Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74, 1929 Miss. LEXIS 264 (Miss. 1929).

Comparative knowledge doctrine is unavailing where servant's injury resulted from master's negligence. Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74, 1929 Miss. LEXIS 264 (Miss. 1929).

It is only where the conductor or engineer voluntarily operates an unsafe engine or cars that they assume the risk of the employment. Durr v. Homochitto Lumber Co., 137 Miss. 442, 102 So. 257, 1924 Miss. LEXIS 217 (Miss. 1924).

This section [Code 1942, § 1456] does not prevent an engineer while repairing an engine from claiming damages from injury caused by the fireman putting the engine in motion against the orders of the engineer. Homochitto Lumber Co. v. Albritton, 132 Miss. 405, 96 So. 403, 1923 Miss. LEXIS 58 (Miss. 1923).

5. Knowledge of danger or defect, effect of.

The doctrine of assumption of risk has been abolished only as between master and servant in certain places and where there is a relationship between a bailor and a bailee, the bailee cannot recover for injuries resulting from a defect of which the bailee knew and continued to use the defective machine after knowledge of defect. Runnels v. Dixie Drive-It-Yourself System Jackson Co., 220 Miss. 678, 71 So. 2d 453, 1954 Miss. LEXIS 483 (Miss. 1954).

It was the duty of an employer to instruct an inexperienced seventeen-year-old boy in the operation of a rip saw. Bonelli v. Flowers, 203 Miss. 843, 33 So. 2d 455, 1948 Miss. LEXIS 327 (Miss. 1948).

Sawmill company's employee, operating gasoline motorcar on such company's railroad with full knowledge of defective condition of horn and brakes, assumed risk of injury in resulting collision with school bus at highway crossing. Eastman, Gardiner & Co. v. Caldwell, 177 Miss. 861, 172 So. 126, 1937 Miss. LEXIS 157 (Miss. 1937).

Driver did not assume risk of driving truck with knowledge of defect in steering wheel, especially when his employer through its agent had promised to repair. Texas Co. v. Jackson, 174 Miss. 737, 165 So. 546, 1936 Miss. LEXIS 213 (Miss. 1936).

Experienced sawmill employee knowing and appreciating danger incident to running saw assumed consequences resulting from his own reckless act when he voluntarily placed his hand in position to be thrown into saw. Eastman Gardiner Hardwood Co. v. Chatham, 168 Miss. 471, 151 So. 556, 1934 Miss. LEXIS 335 (Miss. 1934).

Foreman's order to employee running saw to keep trash out of rollers and keep mill moving was not order not to stop mill to remove trash, making employer liable for injuries to employee when he placed his hand in position to be thrown into saw. Eastman Gardiner Hardwood Co. v. Chatham, 168 Miss. 471, 151 So. 556, 1934 Miss. LEXIS 335 (Miss. 1934).

Employee held not to have assumed risk of injury from cranking employer's truck, where he relied upon employer's promise to have truck repaired. Mississippi Utilities Co. v. Smith, 166 Miss. 105, 145 So. 896, 1933 Miss. LEXIS 330 (Miss. 1933).

6. Questions for jury.

Assumption of the risk is a jury question in all but the clearest cases. McMillan v. McMillan, 262 So. 2d 781, 1972 Miss. LEXIS 1325 (Miss. 1972).

Question of employer's negligence is for jury where employee was working on an unsafe scaffold, the condition of which was called to the attention of the foreman. Ingalls Shipbuilding Corp. v. Trehern, 155 F.2d 202, 1946 U.S. App. LEXIS 2188 (5th Cir. Miss. 1946).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high voltage wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527, 1943 Miss. LEXIS 78 (Miss. 1943).

Where an employee was injured in consequence of lifting a bundle of steel rods while in an awkward posture which he had assumed by direction of his foreman, the question of the employer's negligence, the risk of which under the statute [Code 1942, § 1456] the employee does not assume, is for the jury. Pittman v. Schultz, 125 F.2d 82, 1942 U.S. App. LEXIS 4317 (5th Cir. Miss. 1942).

In action by an employee against his employer for injuries sustained by reason of an explosion resulting from the use of gasoline in starting a fire for the purpose of heating grease guns and warming the employees in connection with the construction of a highway, questions with respect to the employer's duty to furnish a reasonably safe place for its employees to work, reasonably safe instrumentalities to work with, and reasonably safe methods and rules under which to work were for the jury. Curry & Turner Const. Co. v. Bryan, 184 Miss. 44, 185 So. 256, 1939 Miss. LEXIS 18 (Miss. 1939).

Question of master's liability for injuries to servant, received when servant obeyed order of foreman to catch and hold heavy machine being pulled to ledge cut in embankment 25 or 30 feet above level of roadway when block and tackle holding machine was released, held for jury. Gow Co. v. Hunter, 175 Miss. 896, 168 So. 264, 1936 Miss. LEXIS 82 (Miss. 1936).

7. Instructions.

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house when the contractor backed a truck into the laborer, and instruction that if the jury should find that the plaintiff laborer voluntarily and knowingly placed himself in a position of danger, then the plaintiff assumed the risk of injury and could not recover, was properly refused because the doctrine of assumption of the risk is not in force as between a master and servant. Smith v. Jones, 220 So. 2d 829, 1969 Miss. LEXIS 1479 (Miss. 1969).

Where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instructions eliminating entirely the question of whether the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action, were erroneous. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

In action against truck owner for death of truck driver caused by flat tire, refusal of instruction that owner was not liable if driver was fully aware of defect in tire and of danger therefrom, was not error under statute abolishing doctrine of assumption of risk, where there was no evidence to warrant such instruction. Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285, 1938 Miss. LEXIS 97 (Miss. 1938).

RESEARCH REFERENCES

ALR.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew or mechanic. 13 A.L.R.2d 1137.

Failure to furnish assistance to employee as affecting liability for injury or death. 36 A.L.R.2d 8.

Duty and liability of employer to domestic servant for personal injury or death. 49 A.L.R.2d 317.

Necessity and manner of pleading assumption of risk as defense. 59 A.L.R.2d 239.

Failure to warn servant of disease or physical condition disclosed by medical examination. 69 A.L.R.2d 1213.

Applicability of state employers' liability act to action for death caused by maritime tort within a state's territorial waters. 71 A.L.R.2d 1304.

Hammer as simple tool within simple tool doctrine. 81 A.L.R.2d 965.

Distinction between assumption of risk and contributory negligence. 82 A.L.R.2d 1218.

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 A.L.R.4th 1188.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 A.L.R.5th 801.

Am. Jur.

27 Am. Jur. 2d, Employment Relationship §§ 293- 322.

57B Am. Jur. 2d, Negligence §§ 716 et seq.

20 Am. Jur. Proof of Facts 2d 667, Contributory Negligence of Passenger Accepting Ride With Driver Suffering from Drowsiness, Illness, or Physical Defects.

40 Am. Jur. Proof of Facts 2d 603, Employer's Tort Liability Under Dual Capacity Doctrine.

CJS.

30A C.J.S., Employers' Liability for Injuries to Employees §§ 353–424.

65A C.J.S., Negligence §§ 386-390.

Law Reviews.

Spell, Stemming the tide of expanding liability; the coexistence of comparative negligence and assumption of risk. 8 Miss. C. L. Rev. 159, Spring, 1988.

Twyner, A Survey and Analysis of Comparative Fault in Mississippi. 52 Miss. L.J. 563, September 1982.

Montagnet, Assumption of Risk in Mississippi: Eliminating the Confusion While Retaining the Defense – Independent of Comparative Negligence Principles. Comment. 64 Miss. L.J. 753 1995.

§ 11-7-20. Privity unnecessary to maintain actions in negligence, strict liability or breach of warranty.

In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action.

HISTORY: Laws, 1976, ch. 385, § 5, eff from and after passage (approved April 27, 1976).

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Flood zone determinations.

1. In general.

Because a plaintiff who is injured due to a breach of warranty may recover from each seller of the individual product which caused the injury (so long as the product was defective when each respective seller possessed it), and because privity is not a requirement for negligence, strict liability or breach of warranty, plaintiff's negligence and breach of warranty claims against defendant manufacturer survived a motion to dismiss. Tellus Operating Group, L.L.C. v. R & D Pipe Co., 377 F. Supp. 2d 604, 2005 U.S. Dist. LEXIS 19159 (S.D. Miss. 2005).

In an action against a skilled nursing home facility on behalf of one of its patients for failure to protect him from a fire ant attack and for failure to provide adequate medical treatment after the attack, in which the plaintiff amended the complaint to add a pest control company on the basis that it owed a duty to the patient to discover and treat cracks and crevices, the lack of privity between the plaintiff and the pest control company did not preclude the possibility of its liability for negligence. Estate of Posey v. Centennial Health Care Props. Corp., 78 F. Supp. 2d 554, 1999 U.S. Dist. LEXIS 20206 (N.D. Miss. 1999), amended, 1999 U.S. Dist. LEXIS 20249 (N.D. Miss. Dec. 17, 1999).

In legal malpractice actions based on an attorney's negligence in performing title work, there is no longer a requirement of an attorney-client relationship, but rather, the presence or absence of an attorney-client relationship is now merely one factor to be considered in determining the duty owed; an attorney performing title work will be liable to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's title work and suffer a loss proximately caused by the attorney's negligence. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

The purchasers of a home were not barred from bringing a negligence action against a pest control operator, even though a real estate agent engaged the operator's services and the purchasers had no contract with the operator, since § 11-7-20 removed the privity requirement for maintaining a negligence cause of action. However, the demise of the defense of privity removes only a formalistic barrier to recovery, and did not expose the pest control operator to liability to the whole world; the door opened by the demise of privity is limited by more realistic inquiries into foreseeability and detrimental reliance. Hosford v. McKissack, 589 So. 2d 108, 1991 Miss. LEXIS 599 (Miss. 1991), modified, 1991 Miss. LEXIS 864 (Miss. Dec. 11, 1991).

In an action against a construction company for breach of implied warranties and negligent construction of a building, the trial court's granting of summary judgment based on lack of privity was improper; § 11-7-20 abolished the requirement of privity for maintaining an implied warranty or negligence action. May v. Ralph L. Dickerson Constr. Corp., 560 So. 2d 729, 1990 Miss. LEXIS 202 (Miss. 1990).

Statutory rule in § 11-7-20 removes privity requirement in all cases; however, loss of privity defense in no way removes any other defense that might be enjoyed were privity defense still applicable. Hicks v. Thomas, 516 So. 2d 1344, 1987 Miss. LEXIS 2949 (Miss. 1987).

Independent auditor is liable to reasonably foreseeable users of audit who request and receive financial statement from audited entity for proper business purpose, and who then detrimentally rely on financial statement, suffering loss proximately caused by auditor's negligence; this rule protects third parties who request, receive, and rely on financial statement, while it also protects auditor from unlimited number of potential users who might otherwise read financial statement once published; auditor, however, remains free to limit dissemination of his opinion through separate agreement with audited entity. Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 1987 Miss. LEXIS 2705 (Miss. 1987).

Lack of privity between buyer and manufacturer of motor home is no bar to cause of action arising under UCC § 2-314, because privity requirement was statutorily abolished in Mississippi Code Annotated § 11-7-20. Hargett v. Midas International Corp., 508 So. 2d 663, 1987 Miss. LEXIS 2550 (Miss. 1987).

Heat pump manufacturer's attempt in its express limited warranty to limit its liability as to any implied warranty was invalid. Fedders Corp. v. Boatright, 493 So. 2d 301, 1986 Miss. LEXIS 2478 (Miss. 1986).

Since § 11-7-20 removes privity as a requirement in all causes of action for personal injury, property damage, or economic loss brought on account of negligence, strict liability, or breach of warranty, it plainly carries the suggestion that the privity requirement has been removed in all cases, and thus, privity of contract between the builder and the purchaser of a permanent structure on real estate is no longer a prerequisite to a viable cause of action. Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 1983 Miss. LEXIS 2744 (Miss. 1983).

2. Flood zone determinations.

In a case in which a home owner sued a flood zone determination company because of an erroneous flood zone determination, the company had not shown its entitlement to summary judgment as was granted by the district court. While the home owner had not ordered the determination, privity was not the issue; the proper inquiry was whether it was reasonably foreseeable that she would receive and rely on the report and whether the company could have reasonably foreseen that the owner would rely on the flood determination, not whether she was a member of a limited group for whose benefit the determination was intended. Paul v. Landsafe Flood Determination, Inc., 550 F.3d 511, 2008 U.S. App. LEXIS 25297 (5th Cir. Miss. 2008).

RESEARCH REFERENCES

ALR.

Privity of contract as essential to recovery in negligence action against manufacturer or seller of product alleged to have caused injury. 74 A.L.R.2d 1111.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property. 16 A.L.R.3d 683.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property. 61 A.L.R.3d 922.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Admissibility and effect of evidence of professional ethics rules in legal malpractice action. 50 A.L.R.5th 301.

Third-party beneficiaries of warranties under UCC § 52-318. 50 A.L.R.5th 327.

Am. Jur.

17A Am. Jur. 2d, Contracts §§ 407, 408-416 et seq.

40 Am. Jur. Proof of Facts 2d 603, Employer's Tort Liability Under Dual Capacity Doctrine.

CJS.

17A C.J.S., Contracts §§ 836 et seq.

Law Reviews.

1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss L.J. 141, March 1983.

1983 Mississippi Supreme Court Review: Abolition of privity requirement in action against homebuilder. 54 Miss L.J. 99, March 1984.

1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L.J. 467, August, 1987.

Practice References.

1 Am Law Prod Liab 3d, Privity of Contract §§ 13:2, 3.

2 Am Law Prod Liab 3d, Basic Elements of Strict Liability Case § 16:53.

2 Am Law Prod Liab 3d, Privity of Contract §§ 21:38, 40.

3 Am Law Prod Liab 3d, Defects in Real Estate § 38:23.

§§ 11-7-21 through 11-7-27. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-21. [Codes, 1857, ch. 61, art. 43; 1871, § 671; 1880, § 1511; 1892, § 664; 1906, § 722; Hemingway's 1917, § 505; 1930, § 514; 1942, § 1457]

§ 11-7-23. [Codes, 1857, ch. 61, art. 44; 1871, § 672; 1880, § 1512; 1892, § 665; 1906, § 723; Hemingway's 1917, § 506; 1930, § 515; 1942, § 1458]

§ 11-7-25. [Codes, Hutchinson's 1848, ch. 58, art. 1 (47); 1857, ch. 61, art. 51; 1871, § 677; 1880, § 1515; 1892, § 666; 1906, § 724; Hemingway's 1917, § 507; 1930, § 516; 1942, § 1459]

§ 11-7-27. [Codes, Hutchinson's 1848, ch. 58, art. 1 (47); 1857, ch. 61, art. 50; 1871, § 678; 1880, § 1516; 1892, § 667; 1906, § 725; Hemingway's 1917, § 508; 1930, § 517; 1942, § 1460]

Editor's Notes — Former § 11-7-21 pertained to objections to nonjoinder or misjoinder of a plaintiff.

Former § 11-7-23 pertained to objections to nonjoinder or misjoinder of a defendant.

Former § 11-7-25 pertained to death of a party or coparty when there were two or more plaintiffs or defendants.

Former § 11-7-27 provided that an action would not be abated by the death of a nominal plaintiff.

§ 11-7-29. Death of one defendant after judgment.

When judgment shall have been rendered against two or more persons, and any one or more of them shall die, such judgment shall survive against the representatives of the deceased parties and the survivor. A scire facias may issue against the survivor, jointly with the representatives of the deceased parties; and such judgment may be thereupon revived, and execution issued in like manner.

HISTORY: Codes, 1857, ch. 61, art. 52; 1871, § 680; 1880, § 1517; 1892, § 668; 1906, § 726; Hemingway's 1917, § 509; 1930, § 518; 1942, § 1461.

Cross References — Execution of judgment after death of party, see §§ 13-3-149, 13-3-151.

Rule relative to substitution upon death of party, see Miss. R. Civ. P. 25.

JUDICIAL DECISIONS

1. In general.

Where at the time the chancellor rendered his opinion the defendant was dead and the cause was not revived against the duly acting executor, the final decree and subsequent proceedings amount to a nullity, and the Supreme Court, having no jurisdiction, dismissed the appeal without prejudice to any right of the appellee to revive the action. Owen v. Abraham, 233 Miss. 558, 102 So. 2d 372, 1958 Miss. LEXIS 417 (Miss. 1958).

As to jurisdiction over defendant shown by the pleadings, see J. J. Newman Lumber Co. v. Scipp, 128 Miss. 322, 91 So. 11, 1922 Miss. LEXIS 105 (Miss. 1922).

RESEARCH REFERENCES

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 359, 362.

CJS.

49 C.J.S., Judgments §§ 1130–1140.

§§ 11-7-31 through 11-7-39. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-31. [Codes, 1880, § 1521; 1892, § 669; 1906, § 727; Hemingway's 1917, § 510; 1930, § 519; 1942, § 1462]

§ 11-7-33. [Codes, 1880, § 1522; 1892, § 670; 1906, § 728; Hemingway's 1917, § 511; 1930, § 520; 1942, § 1463]

§ 11-7-35. [Codes, Hutchinson's 1848, ch. 61, art. 1 (89); 1857, ch. 61, art. 78; 1871, § 577; 1880, § 1536; 1892, § 671; 1906, § 729; Hemingway's 1917, § 512; 1930, § 521; 1942, § 1464]

§ 11-7-36. [En Laws, 1974, ch. 315]

§ 11-7-37. [Codes, 1857, ch. 61, art. 87; 1871, § 578; 1880, § 1537; 1892, § 672; 1906, § 730; Hemingway's 1917, § 513; 1930, § 522, 1942, § 1465]

§ 11-7-39. [Codes, 1857, ch. 61, art. 89; 1880, § 1539; 1892, § 673; 1906, § 731; Hemingway's 1917, § 514; 1930, § 523; 1942, § 1466]

Editor's Notes — Former § 11-7-31 provided that actions by or against certain public officers, trustees or commissioners would not abate on account of the change of the person occupying such position.

Former § 11-7-33 provided that the manner of commencing an action in the circuit court was by filing a declaration.

Former § 11-7-35 pertained to content of the declaration.

Former § 11-7-36 authorized the pleading of different grounds for relief in a single declaration.

Former § 11-7-37 pertained to a statement of venue in pleadings.

Former § 11-7-39 specified how names of unknown defendants should be stated.

§ 11-7-41. Defendants may be sued by initials in certain cases.

In actions on written instruments, the defendant may be sued by the initial letters or contraction of the Christian name, used by him in his signature to such writing.

HISTORY: Codes, 1857, ch. 61, art. 89; 1871, § 579; 1880, § 1539; 1892, § 674; 1906, § 732; Hemingway's 1917, § 515; 1930, § 524; 1942, § 1467.

RESEARCH REFERENCES

Am. Jur.
59 Am. Jur. 2d, Parties §§ 13- 17, 19-21.

CJS.
67A C.J.S., Parties § 208.

§ 11-7-43. Averment that partners contracted by a name affixed to a writing is sufficient.

In actions against one or more of several partners, it shall be sufficient to declare that he or they made the contract or executed the writing sued on by the co-partnership name, or other signature affixed to such writing.

HISTORY: Codes, 1857, ch. 61, art. 89; 1880, § 1539; 1892, § 675; 1906, § 733; Hemingway's 1917, § 516; 1930, § 525; 1942, § 1468.

JUDICIAL DECISIONS

1. In general.

In action on notes brought against defendants as copartners, allegation that defendants were copartners by virtue of certain conveyance was unnecessary; it being sufficient to allege that defendants were copartners and executed notes by partnership name. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711, 159 So. 407, 1934 Miss. LEXIS 385 (Miss. 1934).

The names of persons composing the firm should be set out in the pleadings. Ivy v. Evans, 132 Miss. 652, 97 So. 194, 1923 Miss. LEXIS 98 (Miss. 1923).

Partners cannot sue or be sued by their partnership name. Blackwell v. John Reid & Co., 41 Miss. 102, 1866 Miss. LEXIS 19 (Miss. 1866).

RESEARCH REFERENCES

Am. Jur.
59 Am. Jur. 2d, Parties §§ 55- 57.
59A Am. Jur. 2d, Partnership §§ 173 et seq.

CJS.
67A C.J.S., Parties §§ 209, 213.

§§ 11-7-45 through 11-7-65. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-45. [Codes, Hutchinson's 1848, ch. 59, art. 1 (60); 1857, ch. 61, art. 90; 1871, § 580; 1880, § 1540; 1892, § 676; 1906, § 734; Hemingway's 1917, § 517; 1930, § 526; 1942, § 1469]

§ 11-7-47. [Codes, 1848, ch. 61, art. 1 (55); 1857, ch. 61, art. 91; 1871, § 581; 1880, § 1541; 1892, § 677; 1906, § 735; Hemingway's 1917, § 518; 1930, § 527; 1942, § 1470]

§ 11-7-49. [Codes, 1857, ch. 61, art. 79; 1871, § 584; 1880, § 1542; 1892, § 678; 1906, § 736; Hemingway's 1917, § 519; 1930, § 528; 1942, § 1471]

§ 11-7-51. [Codes, 1857, ch. 61, art. 80; 1871, § 583; 1880, § 1543; 1892, § 679; 1906, § 737; Hemingway's 1917, § 520; 1930, § 529; 1942, § 1472]

§ 11-7-53. [Codes, 1857, ch. 61, art. 85; 1871, § 589; 1880, § 1544; 1892, § 680; 1906, § 738; Hemingway's 1917, § 521; 1930, § 530; 1942, § 1473]

§ 11-7-55. [Codes, 1942, § 1474; Laws, 1942, ch. 304]

§ 11-7-57. [Codes, Hutchinson's 1848, ch. 61, art. 93; 1871, § 592; 1880, § 1546; 1892, § 681; 1906, § 739; Hemingway's 1917, § 522; 1930, § 531; 1942, § 1475]

§ 11-7-59. [Codes, 1942, § 1475.5; Laws, 1948, ch. 230, §§ 1-6; Laws, 1950, ch. 356, §§ 1, 2 (¶ 2)]

§ 11-7-61. [Codes, 1857, ch. 61, art. 96; 1871, § 598; 1880, § 1549; 1892, § 685; 1906, § 743; Hemingway's 1917, § 526; 1930, § 535; 1942, § 1479]

§ 11-7-63. [Codes, 1857, ch. 61, art. 98; 1871, § 601; 1880, § 1551; 1892, § 687; 1906, § 745; Hemingway's 1917, § 528; 1930, § 537; 1942, § 1481]

§ 11-7-65. [Codes, Hutchinson's 1848, ch. 59, art. 61; 1857, ch. 61, art. 101; 1871, § 604; 1880, § 1554; 1892, § 688; 1906, § 746; Hemingway's 1917, § 529; 1930, § 538; 1942, § 1482]

Editor's Notes — Former § 11-7-45 required that a copy of the account or writing upon which the action is founded be filed with the declaration.

Former § 11-7-47 required that a copy of any writing of which proffer was to be made be annexed to or filed with the pleading.

Former § 11-7-49 required that in all actions on bonds with a condition, plaintiff state the condition and assign breaches thereof in his declaration.

Former § 11-7-51 required that in actions of trespass to land, the place of the alleged trespass be described.

Former § 11-7-53 provided that in actions for libel or slander, the plaintiff need only aver the defamatory sense of words or matter complained of, and that in certain cases, the declaration was sufficient.

Former § 11-7-55 pertained to amendment of declarations.

Former § 11-7-57 made all provisions in reference to declarations applicable to pleas of defendants and to all subsequent pleadings.

Former § 11-7-59 abolished pleas in the circuit court, and provided that defenses be set up by way of answer.

Former § 11-7-61 pertained to giving evidence of mitigating circumstances notwithstanding a plea of not guilty in certain actions.

Former § 11-7-63 pertained to pleading and setting off against demand by plaintiff debts or demands defendant had against plaintiff.

Former § 11-7-65 required defendant to file with his plea a statement of items or writings to be set off.

§ 11-7-67. Balance of mutual dealings on death of one party.

Where there shall have been mutual dealings between two or more persons, and one or more of them shall die before an adjustment of such dealings, the lawful demands of such parties against each other shall be a good payment, or setoff, to the amount thereof, notwithstanding the estate of one or more of such deceased persons shall be insolvent; and only the balance due shall be the debt.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 10; 1857, ch. 61, art. 99; 1871, § 602; 1880, § 1552; 1892, § 689; 1906, § 747; Hemingway's 1917, § 530; 1930, § 539; 1942, § 1483.

Cross References — Rules providing that all claims be presented as claims, counterclaims, or cross-claims, see Miss. R. Civ. P. 8, 13.

Rule relative to substitution upon death of party, see Miss. R. Civ. P. 25.

JUDICIAL DECISIONS

1. In general.

The sale of a dairy farm and the subsequent shooting of the purchaser by the seller do not constitute mutual dealings as contemplated by this section [Code 1942, § 1483], for an unliquidated tort claim cannot be lawfully set off against certain promissory notes executed by the purchasers of the farm payable to the sellers and evidencing a portion of the purchase price. Weaver v. Mason, 228 So. 2d 591, 1969 Miss. LEXIS 1395 (Miss. 1969).

In suit to set aside decree approving executor's account, balance actually due executor as an individual under personal account with testatrix should be ascertained pursuant to rule that entries in books of account are mere evidence of facts, and to statute requiring balance resulting from mutual dealings to be ascertained on death of one party. Howell v. Ott, 182 Miss. 252, 180 So. 52, 181 So. 740, 1938 Miss. LEXIS 139 (Miss. 1938), limited, Kent v. McCaslin, 238 Miss. 129, 117 So. 2d 804, 1960 Miss. LEXIS 387 (Miss. 1960).

An account distinct from mutual dealings with the parties must be probated against the estate of one dying. Cohn v. Carter, 92 Miss. 627, 46 So. 60, 1908 Miss. LEXIS 202 (Miss. 1908).

A debt due by a deceased person cannot be set off against a note given to the administrator for a part of the property sold by him. Mellen v. Boarman, 21 Miss. 100, 1849 Miss. LEXIS 146 (Miss. 1849); Bales v. Hyman, 57 Miss. 330, 1879 Miss. LEXIS 83 (Miss. 1879).

§§ 11-7-69 and 11-7-71. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-69. [Codes, 1942, § 1483.5; Laws, 1952, ch. 249, §§ 1, 2]

§ 11-7-71. [Codes, Hutchinson's 1848, ch. 59, art. 58; 1857, ch. 61, art. 100; 1871, § 603; 1880, § 1553; 1892, § 690; 1906, § 748; Hemingway's 1917, § 531; 1930, § 540; 1942, § 1484]

Editor's Notes — Former § 11-7-69 pertained to the pleading of counterclaims.

Former § 11-7-71 authorized the pleading of payments made at or after maturity.

§ 11-7-73. Disclaiming title and tendering of amends in action for trespass.

In actions in justice court for trespass on land, the defendant may plead that he disclaims any title or claim to the land in question, and that the trespass was involuntary or by negligence, and that he tendered or offered sufficient amends therefor before suit brought, and he shall thereupon bring the amount so tendered into court; and unless the plaintiff in such action shall recover more damage than the amount so tendered, he shall be adjudged to pay the costs of the action.

HISTORY: Codes, 1857, ch. 61, art. 104; 1871, § 607; 1880, § 1555; 1892, § 691; 1906, § 749; Hemingway's 1917, § 532; 1930, § 541; 1942, § 1485; Laws, 1991, ch. 573, § 20, eff from and after July 1, 1991.

Cross References — Acts constituting criminal trespass, generally, see § 97-17-79 et seq.

Rule governing the forms of denial and defenses, see Miss. R. Civ. P. 8.

RESEARCH REFERENCES

Am. Jur.
75 Am. Jur. 2d, Trespass §§ 48, 51.

CJS.
87 C.J.S., Trespass §§ 80-82.

§§ 11-7-75 through 11-7-105. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-75. [Codes, 1857, ch. 61, art. 106; 1871, § 609; 1880, § 1557; 1892, § 693; 1906, § 751; Hemingways's 1917, § 534; 1930, § 543; 1942, § 1487]

§ 11-7-77. [Codes, Hutchinson's 1848, ch. 58, art. 1 (72); 1857, ch. 61, art. 107; 1871, § 610; 1880, § 1559; 1892, § 695; 1906, § 753; Hemingway's 1917, § 536; 1930, § 545; 1942, § 1489]

§ 11-7-79. [Codes, Hutchinson's 1848, ch. 61, art. 1 (64); 1857, ch. 61, art. 108; 1871, § 611; 1880, § 1560; 1892, § 696; 1906, § 754; Hemingway's 1917, § 537; 1930, § 546; 1942, § 1490]

§ 11-7-81. [Codes, Hutchinson's 1848, ch. 61, art. 1 (65); 1857, ch. 61, art. 109; 1871, § 612; 1880, § 1561; 1892, § 697; 1906, § 755; Hemingway's 1917, § 538; 1930, § 547; 1942, § 1491]

§ 11-7-83. [Codes, Hutchinson's 1848, ch. 61, art. 1 (66); 1857, ch. 61, art. 110; 1871, § 613; 1880, § 1562; 1892, § 698; 1906, § 756; Hemingway's 1917, § 539; 1930, § 548; 1942, § 1492]

§ 11-7-85. [Codes, Hutchinson's 1848, ch. 61, art. 1 (65); 1857, ch. 61, art. 111; 1871, § 614; 1880, § 1563; 1892, § 699; 1906, § 757; Hemingway's 1917, § 540; 1930, § 549; 1942, § 1493]

§ 11-7-87. [Codes, 1857, ch. 61, art. 112; 1871, § 615; 1880, § 1564; 1892, § 700; 1906, § 758; Hemingway's 1917, § 541; 1930, § 550; 1942, § 1494]

§ 11-7-89. [Codes, 1857, ch. 61, art. 114; 1871, § 616; 1880, § 1565; 1892, § 701; 1906, § 759; Hemingway's 1917, § 542; 1930, § 551; 1942, § 1495]

§ 11-7-91. [Codes, 1857, ch. 61, art. 115; 1871, § 617; 1880, § 1566; 1892, § 702; 1906, § 760; Hemingway's 1917, § 543; 1930, § 552; 1942, § 1496]

§ 11-7-93. [Codes, 1857, ch. 61, art. 116; 1880, § 1567; 1892, § 703; 1906, § 761; Hemingway's 1917, § 544; 1930, § 553; 1942, § 1497]

§ 11-7-95. [Codes, 1857, ch. 61, art. 117; 1871, § 618; 1880, § 1568; 1892, § 704; 1906, § 762; Hemingway's 1917, § 545; 1930, § 554; 1942, § 1498]

§ 11-7-97. [Codes, 1892, § 705; 1906, § 763; Hemingway's 1917, § 546; 1930, § 555; 1942, § 1499]

§ 11-7-99. [Codes, 1857, ch. 61, art. 119; 1871, § 620; 1880, § 1569; 1892, § 706; 1906, § 764; Hemingway's 1917, § 547; 1930, § 556; 1942, § 1500]

§ 11-7-101. [Codes, 1857, ch. 61, art. 120; 1871, § 593; 1880, § 1570; 1892, § 707; 1906, § 765; Hemingway's 1917, § 548; 1930, § 557; 1942, § 1501]

§ 11-7-103. [Codes, 1857, ch. 61, art. 1871, § 595; 1880, § 1571; 1892, § 708; 1906, § 766; Hemingway's 1917, § 549; 1930, § 558; 1942, § 1502]

§ 11-7-105. [Codes, Hutchinson's 1848, ch. 61, art. 1 (79); 1857, ch. 61, art. 83; 1871, § 587; 1880, § 1572; 1892, § 709; 1906, § 767; Hemingway's 1917, § 550; 1930, § 559; 1942, § 1503]

Editor's Notes — Former § 11-7-75 provided that whenever any pleading concluded to the county, issue would be considered joined thereon, unless demurrer thereto was filed.

Former § 11-7-77 pertained to the payment of costs when pleading was held to be insufficient.

Former § 11-7-79 pertained to assignment of causes when demurrer interposed.

Former § 11-7-81 pertained to judgment on overruling a demurrer to a declaration.

Former § 11-7-83 specified the judgment when a demurrer to a plea matter of the defendant is sustained.

Former § 11-7-85 authorized the court to refuse a frivolous demurrer.

Former § 11-7-87 stated that a joinder in demurrer was not required in any case.

Former § 11-7-89 stated that express color and special traverse were not required in any pleading.

Former § 11-7-91 required that a pleading be signed by the party or his attorney.

Former § 11-7-93 abolished special demurrers.

Former § 11-7-95 specified how the court could deal with obscure, irrelevant or redundant matters in pleadings.

Former § 11-7-97 pertained to bills of particulars.

Former § 11-7-99 authorized the omission of allegations that were not material or traversable.

Former § 11-7-101 provided that formal defense was not required in an answer.

Former § 11-7-103 provided that is was not necessary to use allegations of actionem non and of precludi non.

Former § 11-7-105 stated that if a private statute was pleaded, it was sufficient to refer to it by its title and the date of its passage.

§ 11-7-107. How private way may be pleaded.

A right by virtue of a private way may be pleaded generally in the same manner as if pleading a public way.

HISTORY: Codes, 1857, ch. 61, art. 84; 1871, § 588; 1880, § 1573; 1892, § 710; 1906, § 768; Hemingway's 1917, § 551; 1930, § 560; 1942, § 1504.

Cross References — Method of establishing private way, see § 65-7-201.

§§ 11-7-109 through 11-7-129. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-109. [Codes, 1857, ch. 61, art. 81; 1871, § 585; 1880, § 1574; 1892, § 711; 1906, § 769; Hemingway's 1917, § 552; 1930, § 561; 1942, § 1505]

§ 11-7-111. [Codes, 1857, ch. 61, art. 82; 1871, § 586; 1880, § 1575; 1892, § 712; 1906, § 770; Hemingway's 1917, § 553; 1930, § 562; 1942, § 1506]

§ 11-7-113. [Codes, 1857, ch. 61, art. 178; 1871, § 660; 1880, § 1577; 1892, § 713; 1906, § 771; Hemingway's 1917, § 554; 1930, § 563; 1942, § 1507]

§ 11-7-115. [Codes, Hutchinson's 1848, ch. 59, art. 1(91); 1857, ch. 61, art. 180; 1871, § 621; 1880, § 1581; 1892, § 717; 1906, § 775; Hemingway's 1917, § 558; 1930, § 567; 1942, § 1511]

§ 11-7-117. [Codes, 1857, ch. 61, art. 182; 1871, § 623; 1880, § 1582; 1892, § 718; 1906, § 776; Hemingway's 1917, § 559; 1930, § 568; 1942, § 1512]

§ 11-7-119. [Codes, Hutchinson's 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 183; 1871, § 624; 1880, § 1583; 1892, § 719; 1906, § 777; Hemingway's 1917, § 560; 1930, § 569; 1942, § 1513]

§ 11-7-121. [Codes, 1857, ch. 61, art. 150; 1871, § 631; 1880, § 1703; 1892, § 722; 1906, § 783; Hemingway's 1917, § 566; 1930, § 575; 1942, § 1519; Laws, 1904, ch. 142; Laws, 1948, ch. 229; Laws, 1962, ch. 297]

§ 11-7-123. [Codes, 1857, ch. 61, art. 151; 1871, § 633; 1880, § 1704; 1892, § 723; 1906, § 784; Hemingway's 1917, § 567; 1930, § 576; 1942, § 1520]

§ 11-7-125. [Codes, Hutchinson's 1848, ch. 61, art. 1 (77); 1857, ch. 61, art. 159; 1871, § 641; 1880, § 1721; 1892, § 740; 1906, § 802; Hemingway's 1917, § 590; 1930, § 594; 1942, § 1538]

§ 11-7-127. [Codes, 1857, ch. 61, art. 160; 1871, § 642; 1880, § 1722; § 1892, § 741; 1906, § 803; Hemingway's 1917, § 591; 1930, § 595; 1942, § 1539]

§ 11-7-129. [Codes, 1857, ch. 61, art. 167; 1871, § 649; 1880, § 1705; 1892, § 724; 1906, § 785; Hemingway's 1917, § 568; 1930, § 577; 1942, § 1521]

Editor's Notes — Former § 11-7-109 specified how to plead the performance of conditions precedent.

Former § 11-7-111 specified how to plead a judgment or other determination of a court.

Former § 11-7-113 pertained to defendant's offer and payment of compensation or amends before trial.

Former § 11-7-115 authorized the court to allow amendments to be made to pleadings at any time before verdict.

Former § 11-7-117 specified what variance between allegations and proof were deemed material.

Former § 11-7-119 pertained to the effect of one faulty count out of several counts.

Former § 11-7-121 pertained to when a defendant should plead, when pleas would be tried, and judgments by default.

Former § 11-7-123 pertained to affidavits for continuance.

Former § 11-7-125 provided that every plaintiff desiring to suffer a nonsuit on a trial would be barred therefrom unless he did so before the jury retired to consider the verdict.

Former § 11-7-127 pertained to the plaintiff suffering a nonsuit before the clerk in vacation.

Former § 11-7-129 authorized the parties to waive trial by jury to an issue of fact in actions on contract.

§ 11-7-131. Cases may be taken under judicial advisement.

The judge may take a case under advisement until the next term. If an issue of fact be involved, before taking it under advisement, he shall, on notice to each party, cause the evidence on both sides to be reduced to writing and signed by him. At the next term, the judge shall deliver his opinion in writing, and the evidence and opinion shall be a part of the record without a bill of exceptions. Either party prosecuting an appeal may avail himself of all questions arising upon the record.

HISTORY: Codes, Hutchinson's 1848, ch. 53, art. 6 (13); 1857, ch. 61, art. 10; 1871, § 534; 1880, § 1707; 1892, § 725; 1906, § 786; Hemingway's 1917, § 569; 1930, § 578; 1942, § 1522.

Cross References — Chancery proceedings in vacation, see § 9-5-105.

JUDICIAL DECISIONS

1. In general.

There has been a vast expansion by statutory enactment of the times within which circuit judges are lawfully empowered to conduct court affairs. Although the Mississippi Constitution contemplates circuit courts being held at fixed, stated terms provided by statute, and the circuit courts of this State have had fixed terms, the legislature by various enactments-§§ 11-1-7, 11-7-131 to 133, 11-7-121, 11-1-16, and 9-7-3-has granted circuit courts wide latitude in taking official actions in vacation. [11-1-7, 11-7-133 and 11-7-121 were repealed] Griffin v. State, 565 So. 2d 545, 1990 Miss. LEXIS 285 (Miss. 1990), limited, Presley v. State, 792 So. 2d 950, 2001 Miss. LEXIS 153 (Miss. 2001).

Where a circuit judge took under advisement the plaintiffs' motion for leave to amend their declaration and it was not overruled until the next succeeding term of court had passed, the plaintiffs' right to appeal from the court's order to the Supreme Court remained, for until the order of dismissal was entered no statute of limitations ran against the parties' right to appeal under Code 1942, § 753. McGill v. City of Laurel, 252 Miss. 765, 168 So. 2d 50 (1964).

Where a motion to set aside a judgment for a certain sum is continued and overruled at a subsequent term but the judgment allowed to stand for a less sum, a judgment recovered and enrolled during the interval is prior in lien. Crane v. Richardson, 73 Miss. 254, 18 So. 542, 1895 Miss. LEXIS 80 (Miss. 1895).

Motion for a new trial cannot be kept under advisement longer than the term next succeeding. The section [Code 1942, § 1522] does not apply to motions for new trials as to taking under advisement. Scarborough v. Smith, 52 Miss. 517, 1876 Miss. LEXIS 249 (Miss. 1876); Ross v. Garey, 8 Miss. 47, 1843 Miss. LEXIS 56 (Miss. 1843); Luther v. Borden, 48 U.S. 1, 12 L. Ed. 581, 1849 U.S. LEXIS 337 (U.S. 1849); Kane v. Burrus, 10 Miss. 313, 1844 Miss. LEXIS 149 (Miss. 1844); McClure v. Houston, 18 Miss. 392, 1848 Miss. LEXIS 98 (Miss. 1848); Coopwood v. Prewett, 30 Miss. 206, 1855 Miss. LEXIS 87 (Miss. 1855); Hudson v. Strickland, 49 Miss. 591, 1873 Miss. LEXIS 149 (Miss. 1873).

§ 11-7-133. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hemingway's 1917, § 570; 1930, § 579; 1942, § 1523; Laws, 1912, ch. 158]

Editor's Notes — Former § 11-7-133 authorized circuit court judges to decide cases in vacation, and, with consent of the parties, try cases in vacation.

§ 11-7-135. Exceptions in trials by court — either party may appeal.

In cases tried by the court, either party may take bills of exception, and have an appeal, as in case of trial by jury.

HISTORY: Codes, 1857, ch. 61, art. 169; 1871, § 651; 1880, § 1706; 1892, § 726; 1906, § 787; Hemingway's 1917, § 571; 1930, § 580; 1942, § 1524.

JUDICIAL DECISIONS

1. In general.

Where a minor and his parents were represented by counsel in a youth court, and counsel could have prepared and sent up on appeal a bill of exceptions reflecting proceedings or facts which transpired in that court but did not do so, the Supreme Court in deciding the appeal could consider only such record as was properly before it. In re Simpson, 199 So. 2d 833, 1967 Miss. LEXIS 1315 (Miss. 1967).

In such case a motion for a new trial is not contemplated by the statute; the bill of exceptions must be taken to the judgment. Quin v. Myles, 59 Miss. 375, 1882 Miss. LEXIS 120 (Miss. 1882).

RESEARCH REFERENCES

CJS.

4 C.J.S., Appeal and Error § 315.

§§ 11-7-137 through 11-7-145. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-137. [Codes, 1857, ch. 61, art. 170; 1871, § 652; 1880, § 1723; 1892, § 742; 1906, § 804; Hemingway's 1917, § 592; 1930, § 596; 1942, § 1540]

§ 11-7-139. [Codes, 1857, ch. 61, art. 171; 1871, § 653; 1880, § 1724; 1892, § 743; 1906, § 805; Hemingway's 1917, § 593; 1930, § 597; 1942, § 1541]

§ 11-7-141. [Codes, 1857, ch. 61, art. 172; 1871, § 654; 1880, § 1725; 1892, § 744; 1906, § 806; Hemingway's 1917, § 594; 1930, § 598; 1942, § 1542]

§ 11-7-143. [Codes, 1857, ch. 61, art. 173; 1871, § 655; 1880, § 1726; 1892, § 745; 1906, § 807; Hemingway's 1917, § 595; 1930, § 599; 1942, § 1543]

§ 11-7-145. [Codes, Hutchinson's 1848, ch. 61, art. 1 (142); 1857, ch. 61, art. 152; 1871, § 634; 1880, § 1708; 1892, § 727; 1906, § 788; Hemingway's 1917, § 572; 1930, § 581; 1942, § 1525; Am Laws, 1984, ch. 415, § 1]

Editor's Notes — Former § 11-7-137 authorized the referral of all issues in an action to referees.

Former § 11-7-139 authorized the referral to referees of all cases in which matters of account were in controversy.

Former § 11-7-141 authorized either party to file exceptions to the report of a referee.

Former § 11-7-143 specified the powers of the referee.

Former § 11-7-145 pertained to peremptory challenges in civil suits.

§ 11-7-147. Opening statements allowed.

Before the introduction of the evidence, the plaintiff may briefly state his case orally to the jury, and the evidence by which he expects to sustain it. Then the defendant may briefly state his case, and the evidence by which he expects to support it.

HISTORY: Codes, 1892, § 728; 1906, § 789; Hemingway's 1917, § 573; 1930, § 582; 1942, § 1526.

Cross References — Number of counsel to be heard in criminal case, see § 99-17-11.

JUDICIAL DECISIONS

1. In general.

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to give an opening statement because opening statements were not mandatory under Miss. Code Ann. § 11-7-147. Spicer v. State, 973 So. 2d 184, 2007 Miss. LEXIS 619 (Miss. 2007).

After the district attorney stated that the prosecution did not desire to make an opening statement, the trial court did not err in postponing defendant's opening statement until immediately before he presented his evidence, where there was no showing of manifest abuse of discretion or that substantial prejudice resulted. Black v. State, 308 So. 2d 79, 1975 Miss. LEXIS 1831 (Miss. 1975).

Inasmuch as testimony of witness as to earlier occasion when television antenna fell on power lines causing damage was admissible, plaintiff's attorney in a wrongful death action resulting from electrocution had a right to mention it in his preliminary statement to the jury. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

RESEARCH REFERENCES

ALR.

Propriety of trial court order limiting time for opening or closing argument in civil case-state cases. 71 A.L.R.4th 130.

Propriety of trial court order limiting time for opening or closing argument in criminal case-state cases. 71 A.L.R.4th 200.

Am. Jur.

75A Am. Jur. 2d, Trial §§ 429-439.

CJS.

88 C.J.S., Trial §§ 263-275.

§ 11-7-149. Court officers not to converse with jurors.

The sheriff, bailiff, or other officer, shall not be in the room or converse with a juror after the jury has retired from the bar, save by order of the court. A violation of this section shall subject the offender to a fine of fifty dollars and one week's imprisonment for a contempt.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (137); 1857, ch. 61, art. 156; 1871, § 638; 1880, § 1711; 1892, § 729; 1906, § 790; Hemingway's 1917, § 574; 1930, § 583; 1942, § 1527.

Cross References — Control of jurors by court, see § 13-5-83.

View of place by jury, see § 13-5-91.

Another section derived from same 1942 code section, see § 97-9-57.

Provision that jurors must avoid all contacts with lawyers, litigants, witnesses, or spectators, see Uniform Circuit Court Rule 3.10.

JUDICIAL DECISIONS

1. In general.

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. Horn v. State, 216 Miss. 439, 62 So. 2d 560, 1953 Miss. LEXIS 654 (Miss. 1953).

RESEARCH REFERENCES

ALR.

Prejudicial effect, in criminal case, of communication between court officials or attendants and jurors. 41 A.L.R.2d 227.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors. 41 A.L.R.2d 288.

Am. Jur.

75B Am. Jur. 2d, Trial § 1124.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS.

89 C.J.S., Trial §§ 941–948.

§ 11-7-151. Trial — jury may take evidence to jury room.

All papers read in evidence on the trial of any cause may be carried from the bar by the jury.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (80); 1857, ch. 61, art. 157; 1871, § 639; 1880, § 1712; 1892, § 730; 1906, § 791; Hemingway's 1917, § 575; 1930, § 584; 1942, § 1528.

Cross References — Another section derived from same 1942 code section, see § 99-17-37.

Provision to effect that pleadings shall not be carried into jury room, except insofar as pleading or portion thereof has been admitted in evidence, see Miss. R. Civ. P. 8.

JUDICIAL DECISIONS

1. In general.

Although it is a better practice that exhibits be withheld from the jury room until the jury retires for a verdict, there was no prejudice or error in permitting the jury to carry the exhibits into the jury room following the plaintiff's case in chief and prior to submitting it for a verdict where the exhibits included those submitted by both the plaintiff and the defendant. Huey v. Port Gibson Bank, 390 So. 2d 1005, 1980 Miss. LEXIS 2161 (Miss. 1980).

Where map was paper read in evidence in arson prosecution, permitting jury to take map to jury room when they retire to consider verdict held not error. Whittaker v. State, 169 Miss. 517, 142 So. 474, 1932 Miss. LEXIS 4 (Miss. 1932).

The court should not cause to be withheld from the jury any papers read in evidence on the trial. Lipscomb v. State, 75 Miss. 559, 23 So. 210, 1897 Miss. LEXIS 144 (Miss. 1897).

RESEARCH REFERENCES

ALR.
Prejudicial effect of jury's procurement or use of book during deliberations in civil cases. 31 A.L.R.4th 623.

Am. Jur.
75B Am. Jur. 2d, Trial §§ 1208, et seq.

CJS.
89 C.J.S., Trial §§ 965-971.

§ 11-7-153. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 61, art. 1 (80); 1857, ch. 61, art. 158; 1871, § 640; 1880, § 1713; 1892, § 731; 1906, § 792; Hemingway's 1917, § 576; 1930, § 585; 1942, § 1529]

Editor's Notes — Former § 11-7-153 provided that interpreters could be sworn truly to interpret, when necessary.

§ 11-7-155. Judge not to sum up or comment on testimony or charge jury.

The judge in any civil cause shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (144); 1857, ch. 61, art. 161; 1871, § 643; 1880, § 1714; 1892, § 732; 1906, § 793; Hemingway's 1917, § 577; 1930, § 586; 1942, § 1530; Laws, 1991, ch. 573, § 21, eff from and after July 1, 1991.

Cross References — Instructions in chancery court, see § 11-5-3.
Instructions in county court, see § 11-9-1.
Instruction on number of jurors to agree on verdict in civil case, see § 13-5-93.
Another section derived from same 1942 code section, see § 99-17-35.
Jury instructions in criminal cases, see § 99-17-35.
Procedural provisions with respect to filing of requested instructions, see URCCC 3.07 and MRCrP 22.
Rule covering jury instructions, see Miss. R. Civ. P. 51.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Marking and filing instructions.
3. Language of instructions.
4. Oral instructions.
5. Requested instructions in general.
6. Time for giving instructions.
7. Construction of instructions as a whole.
8. Applicability and responsiveness to pleadings.
9. Applicability of instructions to issues.
10. Applicability and responsiveness to evidence.
11. Assumption of facts.
12. Argumentative instructions.
13. Conflicting and inconsistent instructions.
14. Comment on evidence.

15. Weight of evidence.
16. Undue prominence to particular matters.
17. Peremptory instruction.
18. Modification or withdrawal.
19. Cure of error.
20. Subject matter of instructions.
21. —Credibility of witnesses.
22. — Negligence, generally.
23. —Contributory negligence.
24. —Proximate cause.
25. —Assumption of risk.
26. —Sudden emergency.
27. —Damages; amount of recovery.
28. —Punitive damages.
29. —Instructions on statute.
30. —Miscellaneous.
31. Objections and exceptions.
32. Review.

1. In general.

This section contravenes the constitutional mandate imposed upon the judiciary for the fair administration of justice insofar as the phrase "at the request of either party" prohibits a judge from instructing a jury as to the applicable law of the case; this section shall be applied with the indicated unconstitutional phrase deleted; the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if he deems the ends of justice so require, but the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. Newell v. State, 308 So. 2d 71, 1975 Miss. LEXIS 1830 (Miss. 1975).

A judge may instruct the jury on a point only when requested. Ouille v. Saliba, 246 Miss. 365, 149 So. 2d 468, 1963 Miss. LEXIS 450 (Miss. 1963).

The circuit judge cannot originate instructions or give them on his own motion. Gangloff v. State, 232 Miss. 395, 99 So. 2d 461, 1958 Miss. LEXIS 285 (Miss. 1958).

A trial judge may not testify as a witness upon the merits of the controversy, especially where the trial is by jury and there is only one judge presiding, the functions of judge and witness being incompatible. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

If a judge has notice that he will be called as a witness, he should arrange for someone to try the case, and if he has not sufficient notice to make such arrangement, then he should refuse to testify as a witness in the case. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

Failure to object in advance to the trial judge's testifying as a witness will not preclude appellate review of the propriety of such procedure where immediately thereafter counsel moved that the evidence be stricken and, if not, for a mistrial. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

Statute prohibiting judge to charge law except upon written request of party was not intended to transfer power to instruct jurors as to the law to any person other than trial judge. Dement v. Summer, 175 Miss. 290, 165 So. 791, 1936 Miss. LEXIS 3 (Miss. 1936).

Circuit judge cannot instruct jury of his own motion, but only when written requests are made. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223, 1932 Miss. LEXIS 52 (Miss. 1932).

Construction of statute, subsequently re-enacted, as prohibiting judges from instructing juries without written requests, will not be departed from. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223, 1932 Miss. LEXIS 52 (Miss. 1932).

Courts have the right and should limit the number of instructions, but this is not an arbitrary discretion as instructions should be granted to cover all necessary phases of the case. Yazoo & M. V. R. Co. v. Dees, 121 Miss. 439, 83 So. 613, 1920 Miss. LEXIS 91 (Miss. 1920).

The presiding judge is the source from which the law touching the case is to be supplied and he cannot of his own motion give any instruction whatever. Those given must be in writing and at the request of the party. Bangs v. State, 61 Miss. 363, 1883 Miss. LEXIS 138 (Miss. 1883).

A circuit judge is denied the power of originating instructions not called for or rendered necessary by those required by counsel. Watkins v. State, 60 Miss. 323, 1882 Miss. LEXIS 55 (Miss. 1882).

2. Marking and filing instructions.

Where a number of instructions are

attached together and marked filed by the clerk on the back of a common wrapper they are sufficiently marked and filed within the meaning of this section [Code 1942, § 1530]. Gulf & S. I. R. Co. v. Boswell, 85 Miss. 313, 38 So. 43, 1904 Miss. LEXIS 183 (Miss. 1904).

3. Language of instructions.

The words in an instruction must be accorded their customary and usual significance, and if the meaning of an instruction is clear, then hypercritical criticism of the verbiage employed therein will be ignored. Council v. Duprel, 250 Miss. 269, 165 So. 2d 134, 1964 Miss. LEXIS 462 (Miss. 1964).

Instructions will not be deemed erroneous if, taken together, they furnish a correct guide for the jury. Stoner v. Colvin, 236 Miss. 736, 110 So. 2d 920, 1959 Miss. LEXIS 371 (Miss. 1959).

Instruction correctly stating the law will not be reversed merely because the instruction was too long. Y. D. Lumber Co. v. Aycock, 40 So. 2d 551 (Miss. 1949).

An unhappily phrased instruction or one not exactly technical which does not mislead the jury is not a ground for reversal. Meridian Sanatorium v. Scruggs, 121 Miss. 330, 83 So. 532, 1919 Miss. LEXIS 167 (Miss. 1919); Neely v. Charleston, 204 Miss. 360, 37 So. 2d 495, 1948 Miss. LEXIS 374 (Miss. 1948).

4. Oral instructions.

In an action of bastardy, trial court's comment to defense counsel that questions as to future expenses likely to be incurred for the future support of the child could be asked without violating the rule against conjectural damages was not tantamount to an oral instruction in violation of this section [Code 1942, § 1530]. Thomas v. Cook, 229 Miss. 458, 91 So. 2d 275, 1956 Miss. LEXIS 627 (Miss. 1956).

Where there was an objection to a question asking a witness what effect automobile collision had upon the plaintiff and how the plaintiff's injury affected his palsy condition and whether such condition was better or worse, statements made by the trial court in sustaining the objections did not constitute instructions to the jury. Welch v. Morgan, 225 Miss. 154, 82 So. 2d 820, 1955 Miss. LEXIS 569 (Miss. 1955).

5. Requested instructions in general.

Trial judge held without power to prevent submission of cause to jury without instructions for plaintiff, who requested none. J. C. Penney Co. v. Evans, 172 Miss. 900, 160 So. 779, 1935 Miss. LEXIS 165 (Miss. 1935).

Plaintiff and defendant having both secured instructions announcing same rule, defendant held estopped from asserting that rule was erroneous and that refusal of defendant's instruction inconsistent therewith was error. Yazoo & M. V. R. Co. v. Wade, 162 Miss. 699, 139 So. 403, 1932 Miss. LEXIS 132 (Miss. 1932).

Error cannot be predicated on failure of the court to give instructions not requested. Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459, 1914 Miss. LEXIS 279 (Miss. 1914); Yazoo & M. V. R. Co. v. Messina, 109 Miss. 143, 67 So. 963, 1915 Miss. LEXIS 127 (Miss. 1915), rev'd, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709, 1916 U.S. LEXIS 1461 (U.S. 1916); Stevenson v. State, 136 Miss. 22, 100 So. 525, 1924 Miss. LEXIS 104 (Miss. 1924); Grady v. State, 144 Miss. 778, 110 So. 225, 1926 Miss. LEXIS 392 (Miss. 1926).

Instructions must be requested in writing. St. Louis & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471, 1911 Miss. LEXIS 164 (Miss. 1911); Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459, 1914 Miss. LEXIS 279 (Miss. 1914).

If a jury, after retiring to consider its verdict, request additional instructions, either party may present and ask for additional written instructions, and it will be error to refuse them on the ground that they are too late. Wright v. State, 82 Miss. 421, 34 So. 4, 1903 Miss. LEXIS 133 (Miss. 1903).

An applicant cannot complain of error in an instruction at his own instance, nor of a conflict in instructions caused by his erroneous ones, nor of one more favorable than the law allows. Clisby v. Mobile & O. R. Co., 78 Miss. 937, 29 So. 913, 1901 Miss. LEXIS 147 (Miss. 1901).

6. Time for giving instructions.

After the argument in the case has opened, it is error to give an instruction without stopping the case and giving the opposite party opportunity to comment thereon. Maxey v. State, 140 Miss. 570, 106 So. 353, 1925 Miss. LEXIS 291 (Miss. 1925).

A court should not give an instruction without giving the opposite party opportunity to know thereof and read same. King v. State, 121 Miss. 230, 83 So. 164, 1919 Miss. LEXIS 158 (Miss. 1919); Nelson v. State, 129 Miss. 288, 92 So. 66, 1922 Miss. LEXIS 40 (Miss. 1922).

7. Construction of instructions as a whole.

Instructions should never be used to influence the jury as to how facts should be decided, and when instructions are worded so as to indicate how a jury should decide an issue of fact they are harmful, and unless all instructions, taken together, are written so as to give the jury the full application of the law as to the issues involved the Supreme Court will usually reverse. Keith v. State, 197 So. 2d 480, 1967 Miss. LEXIS 1529 (Miss. 1967), but see Hall v. State, 427 So. 2d 957, 1983 Miss. LEXIS 2444 (Miss. 1983).

An instruction must be considered as a whole, and together with all the instructions received by the parties to the action. Council v. Duprel, 250 Miss. 269, 165 So. 2d 134, 1964 Miss. LEXIS 462 (Miss. 1964).

Instructions will not be deemed erroneous if, taken together, they furnish a correct guide for the jury. Stoner v. Colvin, 236 Miss. 736, 110 So. 2d 920, 1959 Miss. LEXIS 371 (Miss. 1959).

Instruction to the effect that constable in pursuit of reckless driver, sounding his siren, was entitled to assume that other drivers would yield right of way, held, in view of other instructions on proximate cause and duty to have regard to safety of others, no error. Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194, 1959 Miss. LEXIS 559 (Miss. 1959).

Jury is presumed to have obeyed and applied instructions and to have considered them as a whole. Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194, 1959 Miss. LEXIS 559 (Miss. 1959).

In an action upon an accidental death insurance policy, where the insurance company asked for and was granted instructions which covered every defense to which it was entitled, two of which were in substantially the same terms as the two instructions refused by the court, the court did not err in refusing the additional instructions. Benefit Asso. of R. Employees v. Harrison, 233 Miss. 834, 103 So. 2d 925, 1958 Miss. LEXIS 445 (Miss. 1958).

All instructions must be read and considered together. American Creosote Works, Inc. v. Smith, 233 Miss. 892, 103 So. 2d 861, 1958 Miss. LEXIS 454 (Miss. 1958).

Even though some imperfections could be found therein, instructions, which when read together, focused the attention of the jury on the real issue of whether the plaintiff's truck was overtaken from behind, run into and damaged by the negligence of the defendant's driver in operating his truck without proper control, without keeping a proper lookout, and at a negligent rate of speed, or whether plaintiff's driver negligently stopped his truck on the half-moon curve in the right lane of the pavement when it was unnecessary and impractical to do so, and, if so, whether such negligence was the sole, proximate cause of the collision, were not reversibly erroneous. Green Truck Lines, Inc. v. Hooper, 233 Miss. 794, 103 So. 2d 443, 1958 Miss. LEXIS 441 (Miss. 1958).

Instructions, which, when read together, properly instructed the jury as to the degree of care required to be exercised by a nursing home operator toward an aged patient, answered plaintiff's complaint directed toward two certain instructions granted to the defendant. Lagrone v. Helman, 233 Miss. 654, 103 So. 2d 365, 1958 Miss. LEXIS 428 (Miss. 1958).

Not every erroneous instruction requires a reversal of the judgment or the granting of a new trial, but all the instructions must be read and considered together, and, if the instructions, when read and considered as a whole, contain a fairly consistent statement of the law, the judgment will not be reversed because of errors in particular instructions, unless the errors are of such nature as to mislead a jury as to the real issues upon which they are to pass. Scoggins v. Vicksburg Hospital, Inc., 229 Miss. 770, 91 So. 2d 837, 1957 Miss. LEXIS 324 (Miss. 1957).

In an action by a patient against a hospital for injuries sustained as the result of a newsboy entering the patient's hospital room while the patient was asleep and striking him on the foot, thereby disturbing the patient and causing patient to fall or jump out of bed, in view of other instructions given, an erroneous instruction that to constitute negligence the jury would have to find that the hospital could have or should have foreseen that the newsboy would probably have entered the patient's hospital room while he was alone and asleep and the newsboy probably would have struck him or startled him, and as a result of which the patient would jump from or start up in his bed, did not require a reversal of judgment. Scoggins v. Vicksburg Hospital, Inc., 229 Miss. 770, 91 So. 2d 837, 1957 Miss. LEXIS 324 (Miss. 1957).

In an action on seller's demand for the enforcement of his purchase money lien for the balance allegedly due on the purchase of a used airplane, the giving of instructions, which, when read and considered together, were not contradictory or misleading and constituted a sufficient statement of the law on the issue submitted to the jury, was not reversible error. Blount v. Hair, 228 Miss. 898, 90 So. 2d 5, 1956 Miss. LEXIS 579 (Miss. 1956).

In suit by employee against employer for personal injuries, instruction granted employee on issue of whether or not employer took reasonable care to furnish employee with reasonably safe place to work is not reversibly erroneous when that phase of law is thoroughly covered by instructions granted employer and is fairly and sufficiently submitted to jury, since all instructions must be read together. Johns-Mansville Products Corp. v. Cather, 208 Miss. 268, 44 So. 2d 405, 1950 Miss. LEXIS 246 (Miss. 1950).

When jury is fully charged in numerous instructions for both parties as to applicable law of case, two instructions, even if erroneous because referring to allegations of declaration, are not so prejudicial as to require reversal. Jessup v. Reynolds, 208 Miss. 50, 43 So. 2d 753, 1949 Miss. LEXIS 407 (Miss. 1949).

Instruction in action by employee against railroad for damages for personal injury, which is technically erroneous in that it failed to contain work "reasonably" before word "safe" in the phrase "negligent in failing to use reasonable care to maintain the switch. . . in a safe condition," is harmless and not sufficient to require reversal when all instructions as whole correctly defined defendant's duty. St. Louis S. F. R. Co. v. Dyson, 207 Miss. 639, 43 So. 2d 95, 1949 Miss. LEXIS 376 (Miss. 1949).

Construction of all of the instructions as a whole will not cure an instruction that is contradictory of the other instructions and entirely contrary to the law. Wallace v. Billups, 203 Miss. 853, 33 So. 2d 819, 1948 Miss. LEXIS 329 (Miss. 1948).

Instruction as to liability of master for injury to the servant with respect to the manner in which servant was required to perform his work was not erroneous when considered with all the other instructions in the case. C. & R. Lumber Co. v. Crane, 135 Miss. 303, 99 So. 753, 1924 Miss. LEXIS 27 (Miss. 1924).

Although one instruction standing alone may be incorrect, yet if all the instructions taken together constitute the law correctly given the error is harmless. City of Hattiesburg v. Beverly, 123 Miss. 759, 86 So. 590, 1920 Miss. LEXIS 78 (Miss. 1920).

On a point covered by other instructions it is not error to refuse an instruction. Yazoo & M. V. R. Co. v. Walls, 110 Miss. 256, 70 So. 349, 1915 Miss. LEXIS 35 (Miss. 1915); Illinois C. R. Co. v. Redmond, 119 Miss. 765, 81 So. 115, 1919 Miss. LEXIS 15 (Miss. 1919); Bonelli v. Branciere, 127 Miss. 556, 90 So. 245, 1921 Miss. LEXIS 257 (Miss. 1921), overruled, Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541, 1951 Miss. LEXIS 458 (Miss. 1951); T. J. Moss Tie Co. v. Bank of Decatur, 97 So. 417 (Miss. 1923).

It is not error to instruct the jury that private property cannot be damaged for public use except on due compensation being first made where all the charges construed together correctly stated the law. Warren County v. Rand, 88 Miss. 395, 40 So. 481, 1906 Miss. LEXIS 107 (Miss. 1906).

Instructions for plaintiff and defendant must be considered together, and if, on the whole, it appears that the law was fairly embodied in the instructions, the verdict

will be upheld. Yazoo & M. V. R. Co. v. Williams, 87 Miss. 344, 39 So. 489, 1905 Miss. LEXIS 115 (Miss. 1905); Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 So. 505, 1906 Miss. LEXIS 195 (Miss. 1906); Yazoo & M. V. R. Co. v. Kelly, 98 Miss. 367, 53 So. 779, 1910 Miss. LEXIS 73 (Miss. 1910).

8. Applicability and responsiveness to pleadings.

An instruction on one count in a declaration should be limited to said count, otherwise it may constitute reversible error. Thames v. Batson & Hatton Lumber Co., 143 Miss. 5, 108 So. 181, 1926 Miss. LEXIS 238 (Miss. 1926).

An instruction assigning negligence not alleged in the declaration and not shown to be the proximate cause of the injury should not be given. Hines v. McCullers, 121 Miss. 666, 83 So. 734, 1920 Miss. LEXIS 112 (Miss. 1920).

An instruction on a count in the declaration withdrawn from the jury may be reversible error. National Life & Acci. Ins. Co. v. De Vance, 110 Miss. 196, 70 So. 83, 1915 Miss. LEXIS 23 (Miss. 1915).

An instruction must confine rights of recovery on facts alleged in the pleading. McLeod Lumber Co. v. Anderson Mercantile Co., 105 Miss. 498, 62 So. 274, 1913 Miss. LEXIS 204 (Miss. 1913).

An instruction directing the jury to return a verdict in favor of the plaintiff if the evidence showed that she was injured in the manner set out in the declaration was error as tending to confuse and mislead the jury, but such error was not prejudicial where the facts on which the cause of action was grounded were so set out in the declaration that the jury could readily refer to them and ascertain what the court meant by the instruction, and the facts necessary for the jury to believe in order to render a verdict for plaintiff were sufficiently set out in other portions of the instructions. Southern R. Co. v. Ganong, 99 Miss. 540, 55 So. 355, 1911 Miss. LEXIS 226 (Miss. 1911).

If plaintiff's agent consented to defendant's entry and cutting of timber, in case of trespass an instruction that defendant would not be liable where there is no count for the value of the timber, is not erroneous. Hicks v. Mississippi Lumber Co., 95 Miss. 353, 48 So. 624, 1909 Miss. LEXIS 233 (Miss. 1909).

9. Applicability of instructions to issues.

Where a landowner alleged and presented testimony to the effect that a municipality was responsible for sewage invading his land where his cows consumed a quantity of the same resulting in the death of some of them, the landowner made out a case of absolute liability, and the allegation of negligence was surplusage and instructions which may not have adequately defined negligence or set forth acts or omissions constituting negligence were mere surplusage. Town of Fulton v. Mize, 274 So. 2d 129, 1973 Miss. LEXIS 1586 (Miss. 1973).

In action brought by house mover against electric company for injuries he received from coming into contact with live power line, and instruction for defendant that if jury believed plaintiff knew and appreciated dangers existing in connection with overhead power line and voluntarily placed himself in a position to come in contact with it he had assumed the risks incident thereto, including any negligence of defendant, defendant would not be liable for plaintiff's injuries, was erroneously granted; for it prevented application of comparative negligence doctrine by jury and eliminated distinction between assumption of risk and contributory negligence, where there was evidence in record to the effect that an employee of defendant told plaintiff the wire was harmless and plaintiff should take hold of it and lift it up. Crouch v. Mississippi Power & Light Co., 193 So. 2d 144, 1966 Miss. LEXIS 1283, 1967 Miss. LEXIS 1546 (Miss. 1966).

In an eminent domain action where both a mortgagor and mortgagee were parties defendant, it was error to grant an instruction that under Article 1, § 10, of the United States Constitution, no state should enact a law impairing the obligation of prior contracts, for the reason that such an instruction had no place in the action. Mississippi State Highway Com. v. Nixon, 253 Miss. 636, 178 So. 2d 680, 1965 Miss. LEXIS 1022 (Miss. 1965).

Since common-law principles of negligence applied to an action arising out of a motor vehicle collision at an intersection of an existing public road and a new highway under construction which was not open to general vehicular traffic, the court committed reversible error in giving the favored driver instruction, which is solely statutory in origin. Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

An instruction in an assault action as to the permissibility of a finding for plaintiff need not predicate absence of justification by insult by words where, under the evidence, justification is not an issue; nor need it exclude self-defense where the evidence shows that plaintiff was attacked by defendant while conversing with another. Pittman v. Partin, 236 Miss. 517, 111 So. 2d 238, 1959 Miss. LEXIS 345 (Miss. 1959).

In an action against a municipal policeman and the surety upon his official bond for assault upon the plaintiff by the policeman, the trial court did not err in refusing to instruct that the surety company would not be liable for anything unless the policeman was first liable, and that, if the surety was required to pay any part of the judgment, then the individual defendant would be obligated to reimburse the surety for that amount. Vanderslice v. Shoemake, 233 Miss. 523, 102 So. 2d 804, 1958 Miss. LEXIS 411 (Miss. 1958).

In wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year-old child upon the highway, where it appeared that the defendant was confronted with the danger of injury to the boy when he first saw him peddling his bicycle on the highway in front of him, and had had ample time to sound his horn, and bring his automobile under proper control, the court erred in granting an instruction on the sudden emergency doctrine, since it was inapplicable in the case. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

In an action by a patient against the hospital for injury sustained as a result of a newsboy entering the patient's hospital room while he was asleep, and striking him on the foot with a newspaper, thereby startling and causing patient to jump or fall out of bed, it was not error for the court to refuse to instruct that if the plaintiff's injury was caused by the concurring negligence of the hospital's employees and the newsboy, the hospital would be liable to the same extent as though the injury had been caused by the hospital's negligence alone, where the newsboy was not sued as a codefendant and it was not claimed that any hospital employees entered the hospital room with the newsboy, or had any part in the creation of the disturbance complained of. Scoggins v. Vicksburg Hospital, Inc., 229 Miss. 770, 91 So. 2d 837, 1957 Miss. LEXIS 324 (Miss. 1957).

Instructions, regardless of the theoretical law announced thereby, should be applicable to the issues and proof of the particular case. Hunt v. Sherrill, 195 Miss. 688, 15 So. 2d 426, 1943 Miss. LEXIS 153 (Miss. 1943).

Where the real issues of the case are presented by other instructions, it is not reversible error to instruct the jury on a question of law not raised as an issue where it appears to be harmless. Cecil Lumber Co. v. McLeod, 122 Miss. 767, 85 So. 78, 1920 Miss. LEXIS 475 (Miss. 1920).

An instruction should not eliminate an issue supported by the evidence. McNeill v. Bay Springs Bank, 100 Miss. 271, 56 So. 333, 1911 Miss. LEXIS 21 (Miss. 1911); Lackey v. St. Louis & S. F. R. Co., 102 Miss. 339, 59 So. 97, 1912 Miss. LEXIS 62 (Miss. 1912); Harrison v. Garner, 110 Miss. 586, 70 So. 700, 1915 Miss. LEXIS 82 (Miss. 1915).

10. Applicability and responsiveness to evidence.

A requested jury instruction should be denied where, on the evidence, no reasonable juror could, consistent with his oath, find the fact supporting the instruction. Graves v. Graves, 531 So. 2d 817, 1988 Miss. LEXIS 491 (Miss. 1988).

An instruction in an action to recover under a health and accident policy for medical and hospital expenses, to the effect that the plaintiff was not entitled to recovery if he was engaged in the commission of an assault or a felony at the time of injury, was defective on the theories that it was too abstract and not sufficiently related to the facts of the case, where the evidence supported a finding that the insured received his injury while engaged in the pursuit of another person for the purpose of making an unlawful arrest. Taylor v. Taylor, 260 So. 2d 448, 1972 Miss. LEXIS 1563 (Miss. 1972).

In an action on a major medical policy which precluded recovery for care furnished the insured injured while participating in an assault or a felony, an instruction that if the jury should find that the insured, who was hospitalized after being shot while attempting to make a citizen's arrest for a traffic offense, arrested or pursued another for the purpose of arresting without a warrant for an indictable offense or a breach of the peace threatened or attempted in his presence, it would be the jury's duty to return a verdict for the insured, was erroneous where it appeared from the evidence that the insured thought of making a citizen's arrest only after he had failed to find the sheriff and after any traffic offense had long been completed by the victim. Protective Life Ins. Co. v. Spears, 231 So. 2d 510, 1970 Miss. LEXIS 1599 (Miss. 1970).

An instruction should not be given on a charge of negligence not supported by any proof. New Orleans & N. R. Co. v. Ready, 238 Miss. 199, 118 So. 2d 185, 1960 Miss. LEXIS 396 (Miss. 1960).

In an action arising out of an intersectional motor vehicle collision, where the evidence showed that plaintiff's automobile actually entered the intersection first, the trial court committed reversible error in giving an instruction asserting that failure of plaintiff to yield the right of way, if defendant had already entered the intersection, would constitute negligence. Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918, 1960 Miss. LEXIS 457 (Miss. 1960).

In an action for property and personal injury damages suffered by plaintiff when his wagon, while being drawn upon the highway by mules, was struck by defendant's truck, when the record failed to disclose that plaintiff was guilty of the slightest negligence, the trial committed reversible error in instructing that if damages suffered by plaintiff were caused by his own negligence, verdict should be for the defendant. Hughes v. Wright, 233 Miss. 541, 102 So. 2d 798, 1958 Miss. LEXIS 414 (Miss. 1958).

Where there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. Wells v. Bennett, 232 Miss. 736, 100 So. 2d 344, 1958 Miss. LEXIS 322 (Miss. 1958).

Where the maker had admitted the execution of the note, and no credit appeared thereon, and the plaintiff, who was the wife of the payee, had testified that the note had not been paid, the court erred in telling the jury that the plaintiff relied entirely on circumstantial evidence, and that it was the sworn duty of each member of the jury to consider all the circumstantial evidence with great care and caution. Jenkins v. Jenkins, 232 Miss. 879, 100 So. 2d 789, 1958 Miss. LEXIS 343 (Miss. 1958).

In an action by plaintiff for injuries sustained in an intersection automobile collision, the trial court committed reversible error in instructing that the driver of the car in which plaintiff was riding was guilty of negligence in driving his car into the intersection of a through highway without looking to the north immediately before doing so, and that judgment should be for defendants if such negligence were the proximate cause of the collision, where both plaintiff and the driver had testified that before entering the intersection they had looked both to the north and to the south. Moore v. Herman Guy Auto Parts, Inc., 230 Miss. 189, 92 So. 2d 373, 1957 Miss. LEXIS 358 (Miss. 1957).

The court erred in instructing that if the jury believed that a nine-year-old boy, riding a bicycle on the highway, was aware of the approach of the defendant's automobile, or that the actions of the boy while riding on the highway were such that reasonably led the defendant to believe that the child had noticed and was fully aware of the approach of his automobile, the defendant was under no legal duty to sound his horn and continue sounding his horn at short and frequent intervals when approaching the child, where there was no evidence warranting a finding that the boy was aware of the approach of the automobile prior to the time the defendant had sounded his horn when he was only 12 or 15 feet from the child. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

In an action by a plaintiff for personal injuries sustained when a truck in which she was a passenger was struck by defendant's automobile while undertaking to turn from the right lane of traffic across the oncoming traffic lane to enter a driveway, an instruction as to the general duty of an automobile driver with reference to stopping, if necessary to avoid a collision with others, and what it takes to constitute that operation, and submitting the issue as to whether defendant was driving her car so as to be able to avoid such a collision, was not erroneous under the evidence, particularly where, in view of the defendant's own admission, it was clear that she should have reduced her speed, or halted her car completely, if necessary, but that instead of doing this she approached the driveway at an admitted speed of 50 miles an hour, having every reason to believe and know that the truck was in the act of turning or would turn into the driveway. Hamilton v. McCry, 229 Miss. 481, 91 So. 2d 564, 1956 Miss. LEXIS 629 (Miss. 1956).

Where the evidence would not support a finding that plaintiff's negligence was the sole proximate cause of the intersectional collision, the court erred in instructing that plaintiff, at the time of the accident, was under a duty to maintain a look-out for all persons who might have been on or about to cross the highway on which he was traveling, and to use every reasonable precaution to avoid injury or damage to such person, and if plaintiff's failure to do so solely and proximately caused the collision, the jury should find for the defendant. Cobb v. Williams, 228 Miss. 807, 90 So. 2d 17, 1956 Miss. LEXIS 568 (Miss. 1956).

In a case in which evidence supports but one theory upon which plaintiff is entitled to prevail, an instruction which might mislead jury into another and different theory should not be given. Owen v. Sumrall, 204 Miss. 15, 36 So. 2d 800, 1948 Miss. LEXIS 339 (Miss. 1948).

The theory of a party may be embodied in his instruction through the recital of facts if there is testimony to support it and if the jury's verdict on that theory is made conditional on its finding that such facts existed. Murphy v. Burney, 27 So. 2d 773 (Miss. 1946).

Instruction of jury on a correct principal of law, if inapplicable to the facts of the case, was harmless in view of the fact that the jury were instructed in other instructions as to every phase of the questions submitted to them. Mississippi Fire Ins. Co. v. Dixon, 133 Miss. 570, 98 So. 101, 1923 Miss. LEXIS 173 (Miss. 1923).

An instruction assigning negligence not alleged in the declaration and not shown to be the proximate cause of the injury should not be given. Hines v. McCullers, 121 Miss. 666, 83 So. 734, 1920 Miss. LEXIS 112 (Miss. 1920).

An instruction as to argument of counsel is improper. O'Leary v. Illinois C. R. Co., 110 Miss. 46, 69 So. 713, 1915 Miss. LEXIS 11 (Miss. 1915).

An instruction held erroneous because imposing too great a burden on plaintiff. Gentry v. Gulf & S. I. R. Co., 109 Miss. 66, 67 So. 849, 1915 Miss. LEXIS 114 (Miss. 1915).

The proximate cause of injury should be submitted to the jury upon proper instructions of the facts. Yazoo & M. V. R. Co. v. Smith, 103 Miss. 150, 60 So. 73, 1912 Miss. LEXIS 147 (Miss. 1912).

It is error to give an instruction having no application to the facts in the case. Fairfield v. Louisville & N. R. Co., 94 Miss. 887, 48 So. 513, 1909 Miss. LEXIS 350 (Miss. 1909); New Orleans & N. E. R. Co. v. Williams, 96 Miss. 373, 53 So. 619, 1909 Miss. LEXIS 66 (Miss. 1909); Easley v. Alabama G. S. R. Co., 96 Miss. 396, 50 So. 491, 1909 Miss. LEXIS 17 (Miss. 1909); Hunnicutt v. Alabama G. S. R. Co., 50 So. 697 (Miss. 1909).

A case in which too high degree of proof is required by the instructions. Colored Knights of Pythias v. Tucker, 92 Miss. 501, 46 So. 51, 1908 Miss. LEXIS 197 (Miss. 1908).

Instructions on points not raised by the evidence are properly refused. Mobile, J. & K. C. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142, 1908 Miss. LEXIS 218 (Miss. 1908); Kneale v. Lopez & Dukate, 93 Miss. 201, 46 So. 715, 1908 Miss. LEXIS 106 (Miss. 1908).

In case where there is no conflict of evidence on a point, it is error to give instructions on such point as if the matter was doubtful. Mobile, J. & K. C. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142, 1908 Miss. LEXIS 218 (Miss. 1908).

Where there is no evidence upon which to predicate an instruction it is erroneous to give one. Burnley v. Mullins, 86 Miss. 441, 38 So. 635, 1905 Miss. LEXIS 68 (Miss. 1905); American Cent. Ins. Co. v. Antram, 88 Miss. 518, 41 So. 257, 1906 Miss. LEXIS 171 (Miss. 1906); Bank of Newton v. Simmons, 96 Miss. 17, 49 So. 616, 1909 Miss. LEXIS 7 (Miss. 1909); Alabama & V. Ry. Co. v. Baldwin, 96 Miss. 52, 52 So. 358 (1909); New Orleans & N. E. R. Co. v. Williams, 96 Miss. 373, 53 So. 619, 1909 Miss. LEXIS 66 (Miss. 1909); Hooks v. Mills, 101 Miss. 91, 57 So. 545, 1911 Miss. LEXIS 109 (Miss. 1911); Yazoo & M. V. R. Co. v. Dyer, 102 Miss. 870, 59 So. 937, 1912 Miss. LEXIS 130 (Miss. 1912); McLeod Lumber Co. v. Anderson Mercantile Co., 105 Miss. 498, 62 So. 274, 1913 Miss. LEXIS 204 (Miss. 1913); Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824, 1913 Miss. LEXIS 241 (Miss. 1913); Yazoo & M. V. R. Co. v. Aden, 106 Miss. 860, 64 So. 790, 1914 Miss. LEXIS 29 (Miss. 1914); J. J. Newman Lumber Co. v. Dantzler, 107 Miss. 31, 64 So. 931, 1914 Miss. LEXIS 42 (Miss. 1914); Western Union Tel. Co. v. Robertson, 109 Miss. 775, 69 So. 680, 1915 Miss. LEXIS 225 (Miss. 1915); Collins v. Union & Farmers' Bank, 110 Miss. 506, 70 So. 581, 1915 Miss. LEXIS 67 (Miss. 1915).

Erroneous instructions calculated to mislead the jury are not harmless where the testimony would support a verdict for either party. B. E. Brister & Co. v. Illinois C. R. Co., 84 Miss. 33, 36 So. 142, 1904 Miss. LEXIS 10 (Miss. 1904).

An instruction not based on evidence is fatally erroneous if by any means it might mislead the jury. Southern R. Co. v. Lanning, 83 Miss. 161, 35 So. 417, 1903 Miss. LEXIS 25 (Miss. 1903).

An instruction may embody uncontradicted facts proven on the trial and to refuse such is error. Moody v. Chas. Galigher & Son (Miss. 1886).

It is error to refuse to give instructions conditioned upon the facts adduced from the evidence. Noel v. Hooker (Miss. 1886).

11. Assumption of facts.

An instruction in an automobile collision action to the effect that the plaintiff had been in at least three prior automobile accidents and was permanently injured in one of them was not an erroneous commentary on the evidence where there was no controversy that the plaintiff had been in the other accidents. Hankins v. Sanderson Farms, Inc., 226 So. 2d 723, 1969 Miss. LEXIS 1310 (Miss. 1969).

Instructions which assume that one vehicle involved in an automobile accident passed another, a disputed question of fact, or which assume that the driver of the vehicle failed to keep a reasonable look out to the rear, should not be granted. Miller Transporters, Ltd. v. Espey, 253 Miss. 439, 176 So. 2d 249, 1965 Miss. LEXIS 1001 (Miss. 1965), modified, 187 So. 2d 876, 1966 Miss. LEXIS 1367 (Miss. 1966).

In an action against the driver by a share-the-expense guest for injuries allegedly sustained when the automobile foot brake failed to function properly, resulting in the driver's automobile colliding into the rear of another automobile, which had come to a stop, a sudden emergency instruction was erroneous which assumed by the use of the words "failure of the defendant's brakes" that there was evidence in the record upon which the jury might find that both braking systems were defective, when in fact there was no evidence to show that the emergency brake was in any way defective, and which omitted entirely the statement that after the emergency arose, the defendant exercised such care as a reasonably prudent and capable driver would use under the unusual circumstances. Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333, 1958 Miss. LEXIS 396 (Miss. 1958).

When there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. Wells v. Bennett, 232 Miss. 736, 100 So. 2d 344, 1958 Miss. LEXIS 322 (Miss. 1958).

In an action arising out of a collision between an automobile and a truck, the trial court's instruction that the uncontradicted proof in the case showed that the truck owned and operated by the defendant was not equipped with clearance lights and side marker lights and reflectors as required by law, and that such failure to have the truck equipped was negligence on the part of the defendants, and that if such negligence proximately contributed to the collision, the jury should find for plaintiff, was not error, even though it may have had the effect of prejudicing the jury as against the defendants, since established facts can properly be assumed in the instructions. Arnold v. Reece, 229 Miss. 862, 92 So. 2d 237, 1957 Miss. LEXIS 335 (Miss. 1957).

In an action arising out of a motor vehicle intersectional collision, an instruction should not have been given which was based upon the assumption that the defendant was about to cross at an intersection when the proof showed that the defendant was not about to cross at an intersection, but was about to make a left turn on a through highway upon which he had been traveling. Cobb v. Williams, 228 Miss. 807, 90 So. 2d 17, 1956 Miss. LEXIS 568 (Miss. 1956).

In action for damages to automobile arising out of ramming by truck from rear, trial court committed no error in refusing instruction to plaintiff based on assumption that brakes on defendant's truck were not efficient, when, as matter of fact, there was no such evidence in record. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

In action arising out of collision of two trucks on highway, instruction is not erroneous as assuming truck which inflicted damage was owned by defendant when there is no dispute in case that defendant did in truth own it. West v. Aetna Ins. Co., 208 Miss. 776, 45 So. 2d 585, 1950 Miss. LEXIS 296 (Miss. 1950).

Instructions assuming a matter in issue are erroneous. Dixie Stock Yard, Inc. v. Ferguson, 192 Miss. 166, 4 So. 2d 724, 1941 Miss. LEXIS 19 (Miss. 1941).

Facts must not be assumed in the giving of instruction. Griffin v. Griffin, 93 Miss. 651, 46 So. 945, 1908 Miss. LEXIS 112 (Miss. 1908); Reid v. Yazoo & M. V. R. Co., 94 Miss. 639, 47 So. 670, 1909 Miss. LEXIS 323 (Miss. 1909); Godfrey v. Meridian R. & L. Co., 101 Miss. 565, 58 So. 534, 1911 Miss. LEXIS 172 (Miss. 1911); Illinois C. R. Co. v. Harris, 108 Miss. 574, 67 So. 54, 1914 Miss. LEXIS 241 (Miss. 1914).

An instruction assuming on a conflict of evidence that the plaintiff was riding in a dangerous place is erroneous. Reid v. Yazoo & M. V. R. Co., 94 Miss. 639, 47 So. 670, 1909 Miss. LEXIS 323 (Miss. 1909).

Where the plaintiff in replevin claims the property under a sale, an instruction which assumes that the sale under which the plaintiff claimed was not bona fide, is erroneous. Griffin v. Griffin, 93 Miss. 651, 46 So. 945, 1908 Miss. LEXIS 112 (Miss. 1908).

An instruction is not objectionable as being on the weight of the evidence, because it assumes as true matters proven by both parties or about which there is no controversy. Alabama & V. R. Co. v. Phillips, 70 Miss. 14, 11 So. 602, 1892 Miss. LEXIS 57 (Miss. 1892).

An instruction is erroneous if it assume as true a disputed fact of vital importance. French v. Sale, 63 Miss. 386, 1885 Miss. LEXIS 84 (Miss. 1885), limited, Garmon v. State, 66 Miss. 196, 5 So. 385, 1888 Miss. LEXIS 88 (Miss. 1888).

12. Argumentative instructions.

A condemnor's instruction in an eminent domain proceeding that in determining the fair market value of the defendant's land before the taking of an easement for a power line across it the jury "must take into account" previously existing pipeline easements and the increase or decrease in the value of the defendant's land before the taking which results from the existence of the pipeline easements, and that the jury may not award to the defendant any amount for damages resulting to the land from the presence of the pre-existing easements, was misleading and argumentative and constituted a comment on the testimony in the case. White v. Mississippi Power Co., 252 Miss. 97, 171 So. 2d 312, 1965 Miss. LEXIS 1081 (Miss. 1965).

Where there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. Wells v. Bennett, 232 Miss. 736, 100 So. 2d 344, 1958 Miss. LEXIS 322 (Miss. 1958).

And a refusal of such instructions is not reversible error. Carter v. State, 140 Miss. 265, 105 So. 514, 1925 Miss. LEXIS 259 (Miss. 1925).

Instructions should not be argumentative nor on the weight of the evidence nor emphasize certain portions of the evidence. Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909).

Where appellant asked for and was given an instruction propounding a legal proposition as applicable to the case, he cannot complain of an instruction for the appellee because it propounded the same proposition. Gulf & S. I. R. Co. v. Boswell, 85 Miss. 313, 38 So. 43, 1904 Miss. LEXIS 183 (Miss. 1904).

13. Conflicting and inconsistent instructions.

A trial court committed reversible error in peremptorily instructing the jury in a personal injury action that the defendant was negligent as a matter of law and then instructing the jury that the plaintiffs were still required to prove that the defendant was negligent by a preponderance of the evidence, since the instructions were contradictory as well as confusing. Elam v. Pilcher, 552 So. 2d 814, 1989 Miss. LEXIS 11 (Miss. 1989).

Where the plaintiff's automobile struck the defendant's automobile which was disabled on the highway as a result of an accident caused by the defendant's negligence, the court properly refused the defendant's instruction that the driver of the plaintiff's automobile was guilty of negligence as a matter of law, for this instruction was in conflict with an instruction given for the plaintiff in which the court properly instructed the jury that the negligence of the defendant caused or contributed to the second accident. Huff v. Boyd, 242 So. 2d 698, 1971 Miss. LEXIS 1496 (Miss. 1971).

A peremptory instruction for the plaintiff and an "unavoidable accident" instruction given for one of the defendants are in conflict and could only serve to confuse the jury. Miller Transporters, Ltd. v. Espey, 253 Miss. 439, 176 So. 2d 249, 1965 Miss. LEXIS 1001 (Miss. 1965), modified, 187 So. 2d 876, 1966 Miss. LEXIS 1367 (Miss. 1966).

An instruction is not objectional as in conflict with another, where such other was improperly given. Vaughan v. Lewis, 236 Miss. 792, 112 So. 2d 247, 1959 Miss. LEXIS 378 (Miss. 1959).

In an action for personal injuries sustained in an automobile collision, the trial court erred in granting the plaintiff an instruction with reference to whether the driver of the automobile has a right to assume that all other persons are obeying the traffic laws, which instruction was also in conflict with one granted to the defendant, but where it appeared from the record that no impartial jury, duly mindful of the obligations of their oath, could have reached a different result, the Supreme Court, under Rule 11, Revised Rules of the Supreme Court, refused to reverse the case. Brown v. Addington, 233 Miss. 435, 102 So. 2d 365, 1958 Miss. LEXIS 400 (Miss. 1958).

Instructions that if the jury were reasonably satisfied from a preponderance of the evidence that the defendant committed the fraud complained of, verdict should be rendered for plaintiff was erroneous, and conflicting and irreconcilable instruction, on behalf of defendant, that fraud must be shown by clear and convincing evidence, did not cure the error. Hunt v. Sherrill, 195 Miss. 688, 15 So. 2d 426, 1943 Miss. LEXIS 153 (Miss. 1943).

However, conflicting instructions should not be given. Illinois C. R. Co. v. McGowan, 92 Miss. 603, 46 So. 55, 1908 Miss. LEXIS 199 (Miss. 1908); McNeill v. Bay Springs Bank, 100 Miss. 271, 56 So. 333, 1911 Miss. LEXIS 21 (Miss. 1911).

A litigant cannot complain of a conflict in instructions caused by his erroneous ones. Clisby v. Mobile & O. R. Co., 78 Miss. 937, 29 So. 913, 1901 Miss. LEXIS 147 (Miss. 1901).

14. Comment on evidence.

In a personal injury case, the court's jury instructions did not improperly comment on the evidence because nothing in the judge's explanation indicated anything about how the judge felt that the jury should rule, nor was the judge's comment "tantamount" to commenting on evidence that had been presented; the example of apportionment of fault given to the jury was simply to aid their understanding of what would happen when they rendered their verdict, and how the form of their verdict should look. Walker v. Gann, 955 So. 2d 920, 2007 Miss. App. LEXIS 290 (Miss. Ct. App. 2007).

In an action for negligence and breach of warranty arising from the defendant's sale of a combine to the plaintiff, it was error for the court to joke that the combine was manufactured on a Friday the 13th, as his joke went directly to the quality of the combine. Parker Tractor & Implement Co. v. Johnson, 1999 Miss. LEXIS 346 (Miss. Nov. 4, 1999), op. withdrawn, sub. op., 819 So. 2d 1234, 2002 Miss. LEXIS 3 (Miss. 2002).

The trial court in an automobile accident case erred reversibly in granting a jury instruction stating that plaintiff's burden of proving that the injuries complained of were a result of the accident by a preponderance of the evidence was not met by testimony that plaintiff's symptoms appeared after the accident and did not exist prior to the accident, since that instruction was a direct and improper comment upon the evidence by the court in contravention of § 11-7-155, was argumentative, and was misleading. Barkley v. Miller Transporters, Inc., 450 So. 2d 416, 1984 Miss. LEXIS 1693 (Miss. 1984).

An instruction in an automobile collision action to the effect that the plaintiff had been in at least three prior automobile accidents and was permanently injured in one of them was not an erroneous commentary on the evidence where there was no controversy that the plaintiff had been in the other accidents. Hankins v. Sanderson Farms, Inc., 226 So. 2d 723, 1969 Miss. LEXIS 1310 (Miss. 1969).

A condemnor's instruction in an eminent domain proceeding that in determining the fair market value of the defendant's land before the taking of a power line easement across it the jury "must take into account" previously existing pipeline easements and the increase or decrease in the value of defendant's land before the taking which results from the existence of such easements, and that the jury may not award to defendant any amount for damages resulting to the land from the presence of the pre-existing easements, was misleading and argumentative and constituted a comment upon the testimony in the case. White v. Mississippi Power Co., 252 Miss. 97, 171 So. 2d 312, 1965 Miss. LEXIS 1081 (Miss. 1965).

Where the maker had admitted the execution of the note and no credit appeared thereon, and the plaintiff, who was the wife of the payee, had testifed that the note had not been paid, the court erred in telling the jury that the plaintiff relied entirely on circumstantial evidence and that it was the sworn duty of each member of the jury to consider all the circumstantial evidence with great care and caution. Jenkins v. Jenkins, 232 Miss. 879, 100 So. 2d 789, 1958 Miss. LEXIS 343 (Miss. 1958).

Instruction in substance that witnesses in automobile colliding with bus were interested, and witnesses in bus were disinterested, and to consider interest in weighing testimony, held error as comment on evidence. D'Antoni v. Teche Lines, Inc., 163 Miss. 668, 143 So. 415, 1932 Miss. LEXIS 83 (Miss. 1932).

15. Weight of evidence.

Defendant power company's instruction in wrongful death action to the effect that the deceased was presumed to have seen the electric power line and to have known of its presence, was properly refused, since there was no presumption to that effect, and moreover the instruction was an attempt to instruct on the weight and worth of the evidence by adding an inference in violation of Code 1942, § 1530. Mississippi Power & Light Co. v. Shepard,

285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

A jury instruction for the defendant in an automobile collision case to the effect that if the jury finds, after considering all of the evidence, that the evidence is evenly balanced for the defendant and for a plaintiff, they must find for the defendant, was erroneously granted. First Nat'l Bank v. Mississippi State Highway Com., 227 So. 2d 118, 1969 Miss. LEXIS 1336 (Miss. 1969).

An instruction on reputation which required a jury to weigh the evidence of diagnosis and treatment in the light of a doctor's reputation was, in effect, an instruction upon the weight of the testimony in violation of the requirements of this section [Code 1942, § 1530], and the instruction was improvidently given in a malpractice case in which the reputation of the physician was not in issue. De Laughter v. Womack, 250 Miss. 190, 164 So. 2d 762, 1964 Miss. LEXIS 455 (Miss. 1964).

An instruction in a condemnation case was improper where it told the jury that the burden of proof is on the condemnor to show by the greater weight of the more convincing evidence the amount of defendant's damage, and that such burden is not met if the evidence for defendant is just as strong and convincing, in which case they would return a verdict for defendant in such amount as in view of all the evidence would afford full compensation. Mississippi State Highway Com. v. Fisher, 249 Miss. 198, 161 So. 2d 780, 1964 Miss. LEXIS 386 (Miss. 1964).

In a personal injury action arising out of a motor vehicle collision, an instruction that the burden was on the plaintiff to prove the material allegations of his declaration by preponderance of the testimony, and if he had failed in this, it was the jury's sworn duty to find for the defendant, was disapproved. Winfield v. Magee, 232 Miss. 57, 98 So. 2d 130, 1957 Miss. LEXIS 443 (Miss. 1957).

In a will contest where the court instructs the jury for the contestants that they may consider as a circumstance against the validity of the will the long time intervening between the death of the testator and the date when the will was produced for probate, the instruction was erroneous not only that it singled out portions of the evidence, but it was also a charge upon the weight of evidence in direct contravention of this section [Code 1942, § 1530]. Harrison v. Gatewood, 211 Miss. 121, 51 So. 2d 59, 1951 Miss. LEXIS 339 (Miss. 1951).

When facts are established by preponderance of evidence, jury may believe those facts from the evidence, and it is wholly unnecessary for an instruction to contain word "preponderance" in such instances. St. Louis S. F. R. Co. v. Dyson, 207 Miss. 639, 43 So. 2d 95, 1949 Miss. LEXIS 376 (Miss. 1949).

In action for damages for false arrest and imprisonment wherein evidence shows that defendant failed to attend court because of illness, that no notice of trial date and that prosecution was dismissed without trial and exoneration of plaintiff, instruction that ill health on part of one guilty of falsely or maliciously causing arrest of another is no excuse in law is bad because it is an instruction on weight of evidence. Simonton v. Moore, 204 Miss. 760, 38 So. 2d 94, 1948 Miss. LEXIS 402 (Miss. 1948).

Instruction in an action for injuries to a child ten or twelve years old from contact with an electric wire, that the jury in determining contributory negligence must "consider the fact that the plaintiff in this case has lived all his life in a city, where they had electric lights and electric wires, and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies," is erroneous, as being a charge on the weight of the evidence. Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909).

Instruction on weight of evidence is erroneous. Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909); Hooks v. Mills, 101 Miss. 91, 57 So. 545, 1911 Miss. LEXIS 109 (Miss. 1911).

An instruction on the weight of evidence is forbidden. French v. Sale, 63 Miss. 386, 1885 Miss. LEXIS 84 (Miss. 1885), limited, Garmon v. State, 66 Miss. 196, 5 So. 385, 1888 Miss. LEXIS 88 (Miss. 1888); Williams v. State, 32 Miss. 389, 1856 Miss.

LEXIS 223 (Miss. 1856); Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909).

An instruction that the testimony of experts is to be "received with caution, as the opinion of such witnesses, however honestly entertained, may be erroneous," is on the weight of evidence. Louisville, N. O. & T. R. Co. v. Whitehead, 71 Miss. 451, 15 So. 890, 1893 Miss. LEXIS 94 (Miss. 1893).

In view of the facts an instruction was held to be on the weight of the evidence and erroneous. Kimbrough v. Ragsdale, 69 Miss. 674, 13 So. 830, 1892 Miss. LEXIS 40 (Miss. 1892).

An instruction is not objectionable as being on the weight of the evidence, because it assumes as true matters proven by both parties or about which there is no controversy. Alabama & V. R. Co. v. Phillips, 70 Miss. 14, 11 So. 602, 1892 Miss. LEXIS 57 (Miss. 1892).

16. Undue prominence to particular matters.

An instruction that the law did not countenance blind reliance upon an automobile operator, approaching a stop sign, observing it, so, even if plaintiff was driving his automobile on a through street protected by stop signs, he did not have an unqualified privilege in the right of way, and was under a duty to observe due care in approaching and traversing the intersection, placed undue emphasis on plaintiff's duty to observe due care to avoid the collision and practically relieved the defendant from any duty to exercise due care at the intersection. Dame v. Estes, 233 Miss. 315, 101 So. 2d 644, 1958 Miss. LEXIS 382 (Miss. 1958).

Instruction giving undue prominence to certain evidence is erroneous. Hooks v. Mills, 101 Miss. 91, 57 So. 545, 1911 Miss. LEXIS 109 (Miss. 1911).

Instruction in action for injuries to a child, ten or twelve years old, from contact with electric wire, that jury in determining contributory negligence must consider the fact that plaintiff had lived all his life in the city where they had electric lights and wires, and the fact that he thus had opportunities to learn and appreciate their danger, held erroneous as singling out and giving undue prominence to a part of the evidence, to the exclusion of the remainder. Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909).

17. Peremptory instruction.

In an action by an employee against his employer arising from an on-the-job injury, the trial court properly granted the employee peremptory instructions on contributory negligence and assumption of the risk, even though § 11-7-17 provides that "all questions of negligence and contributory negligence shall be for the jury to determine," where there was no proof indicating that any potential negligence or assumption of the risk by the employee led to the injury. Vicksburg v. Young, 616 So. 2d 883, 1992 Miss. LEXIS 779 (Miss. 1992).

The rule for determining whether a peremptory instruction is appropriate requires that all evidence favorable to the party against whom the peremptory instruction is requested must be accepted as true, all evidence in favor of the party requesting the peremptory instruction in conflict with that of the other party must be disregarded, and if the evidence and the reasonable inferences to be drawn from same will support a verdict for the party against whom it is requested, then the peremptory instruction should be refused. Whittley v. Meridian, 530 So. 2d 1341, 1988 Miss. LEXIS 364 (Miss. 1988).

If the court is in doubt whether a peremptory instruction should be granted, the proper procedure is for the court to submit the issue to the jury, then, if the court determines upon further deliberation that the verdict is contrary to law, to sustain a motion for a judgment notwithstanding the verdict, so that, if the Supreme Court concludes that the granting of such judgment was error, the judgment based on the jury verdict can be reinstated without the necessity of remanding the case for a new trial, saving time and expense for the court and litigants. Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 1970 Miss. LEXIS 1661 (Miss. 1970).

Where the sole and proximate cause of an accident which occurred when a tire of a bus sustained a blowout was the bus company's negligence in using a recapped tire on the front wheel of the bus in violation of federal and state regulations, the plaintiffs were entitled to a peremptory instruction against the bus company but were not entitled to such instruction against both the busdriver and the bus company. Martin v. State, 222 So. 2d 816, 1969 Miss. LEXIS 1556 (Miss. 1969).

In an action for injuries sustained by a contractor's laborer during the construction of a chicken house, where there was ample proof in the record from which the jury could determine that the contractor was negligent in backing a truck into the laborer, pinning him against the side of the chicken house, the contractor's motion for a peremptory instruction and motion for a directed verdict were properly refused. Smith v. Jones, 220 So. 2d 829, 1969 Miss. LEXIS 1479 (Miss. 1969).

In an action against an owner and a contractor for injuries sustained by the contractor's laborer during the construction of a chicken house, where the owner exercised absolutely no control over the details of the construction or acts of the contractor's three laborers, so that the contractor was an independent contractor and not a servant of the owner, and there was no agency relationship between them, negligence of the contractor could not be imputed to the owner, and the owner was entitled to a peremptory instruction absolving him of liability. Smith v. Jones, 220 So. 2d 829, 1969 Miss. LEXIS 1479 (Miss. 1969).

In a bank's replevin suit, in which it alleged that the bank was entitled to immediate possession of a house trailer being wrongfully withheld from the bank by the alleged purchasers of the trailer under a conditional sales contract held by the bank, where the bank rested after introducing into evidence the affidavit in replevin, the writ of replevin with the sheriff's return thereon, and its declaration in replevin, and nothing further, the motion of the defendants for a directed verdict at that time, should have been sustained, the bank having introduced no evidence to show its right to the immediate possession of the trailer. Patrick v. Michigan Nat'l Bank, 220 So. 2d 273, 1969 Miss. LEXIS 1440 (Miss. 1969).

Where evidence is uncontradicted that plaintiffs' decedent failed to stop at a stop sign as required by Code 1942, § 8197, the defendants were entitled to a peremptory instruction that if such failure was the sole proximate cause of the injuries and death of the decedent the jury should find for the defendants. Bush Constr. Co. v. Walters, 254 Miss. 266, 179 So. 2d 188, 1965 Miss. LEXIS 946 (Miss. 1965).

A peremptory instruction that defendant driver was guilty of negligence that proximately contributed to the collision and the resulting death of plaintiffs' decedent, on the theory that the result in a former case involving the same collision but a different decedent was the law of the present case, was erroneously granted. Bush Constr. Co. v. Walters, 254 Miss. 266, 179 So. 2d 188, 1965 Miss. LEXIS 946 (Miss. 1965).

A peremptory instruction for the plaintiff and an "unavoidable accident" instruction given for one of the defendants are in conflict and could only serve to confuse the jury. Miller Transporters, Ltd. v. Espey, 253 Miss. 439, 176 So. 2d 249, 1965 Miss. LEXIS 1001 (Miss. 1965), modified, 187 So. 2d 876, 1966 Miss. LEXIS 1367 (Miss. 1966).

In a wrongful death case arising from an automobile collision involving several vehicles, for the plaintiff to be entitled to a peremptory instruction it should appear from the evidence which defendant or defendants is guilty of negligence proximately contributing to his injury, and such an instruction should not be given directing the jury to find someone among the defendants who should pay. Miller Transporters, Ltd. v. Espey, 253 Miss. 439, 176 So. 2d 249, 1965 Miss. LEXIS 1001 (Miss. 1965), modified, 187 So. 2d 876, 1966 Miss. LEXIS 1367 (Miss. 1966).

Where under the evidence the jurors could have found, and evidently did, that plaintiff, while endeavoring to pass a trailer-truck, gave the proper signal and acted as a prudent man, but that defendant pulled into the left lane and struck the plaintiff's automobile without giving any kind of warning or signal that he was leaving the right or east lane and pulling into the west lane, the peremptory instruction requested by the defendant was properly refused. American Creosote Works, Inc. v. Smith, 233 Miss. 892, 103 So. 2d 861, 1958 Miss. LEXIS 454 (Miss. 1958).

In an action for personal injuries sustained when a blind pedestrian was struck when defendant backed his automobile from his driveway to a public street in a thickly populated neighborhood, where the evidence established that the defendant failed to stop his automobile upon the rear of the driveway before entering the sidewalk area, the trial court properly granted the pedestrian a peremptory instruction and liability. Hatten v. Brame, 233 Miss. 509, 103 So. 2d 4, 1958 Miss. LEXIS 410 (Miss. 1958).

In an action against a municipal policeman and the surety on his official bond for wrongful assault upon the plaintiff by the policeman, where the jury was warranted in finding that the assault and battery was committed by the officer while acting under color of his office, and that his acts were not purely private and personal, the defendants were not entitled to a peremptory instruction. Vanderslice v. Shoemake, 233 Miss. 523, 102 So. 2d 804, 1958 Miss. LEXIS 411 (Miss. 1958).

Plaintiff, in an action for the wrongful death of a four and one-half year old child, was not entitled to a peremptory instruction, where he offered no witnesses to contradict the testimony of the defendant and his wife that the boy and his grandmother were walking along the highway shoulder and the child jerked loose from the grandmother and suddenly darted in front of defendant's automobile, but relied largely upon testimony as to measurements and distances, from which it was argued that the accident could not happen in the manner in which the defendant had stated. Hawkins v. Rye, 233 Miss. 132, 101 So. 2d 516, 1958 Miss. LEXIS 365 (Miss. 1958).

Where a loan service company purported to make arrangements for a borrower to borrow money from another firm, which did not actually loan money on the borrower's credit but on the unconditional indorsement of the loan by the loan service company, the loan service company was not a broker, but the lender, so that a "brokerage" fee of $13 on a loan of $25 was in fact interest and usurious, and in a replevin action against a borrower by the trustee of the loan service company, the borrower was entitled to a peremptory instruction. Richardson v. Cortner, 232 Miss. 885, 100 So. 2d 854, 1958 Miss. LEXIS 344 (Miss. 1958).

In absence of any proof that the insured had any enforceable rights against another for damages to which the insurer had been subrogated, the trial court properly granted a peremptory instruction in favor of the insured in an action by the insurer for damages for the breach of a subrogation agreement. Washington Fire & Marine Ins. Co. v. Williamson, 233 Miss. 33, 100 So. 2d 852, 1958 Miss. LEXIS 353 (Miss. 1958).

In an action by a motorist for injuries sustained when his automobile was struck from behind by a truck owned by employer and driven by an employee, wherein the employer contended that at the time of the collision the employee had forsaken the employer's business and was pursuing a mission personal to the employee and on a route wholly different from what he had previously used, the employer was not entitled to the peremptory instruction, where it appeared that even if the employee had deviated from his route he had not abandoned his master's business. Pennebaker v. Parker, 232 Miss. 725, 100 So. 2d 363, 1958 Miss. LEXIS 321 (Miss. 1958).

Where the record disclosed that the tenant had sustained some damages which should have been offset against the rent and attorney's fee sued for by the landlords, the landlords were not entitled to a peremptory instruction for the amount sued for. Walters v. Fine, 232 Miss. 494, 95 So. 2d 229, 1957 Miss. LEXIS 485 (Miss. 1957).

Where a church, although refusing Highway Commission's offer of $1,500 for particular land, accepted a $1,600 check given as consideration for the land, indorsed it by its officers, deposited it, and made disbursement from the funds, the church ratified the sale and the Highway Commission was entitled to a peremptory instruction in the church's action for trespass and taking of the property. Mississippi State Highway Dep't v. Bethlehem

Baptist Church, 232 Miss. 335, 99 So. 2d 221, 1957 Miss. LEXIS 480 (Miss. 1957).

Where the defendant's testimony as to his own good faith in cutting timber was uncontradicted, and plaintiff admitted that no merchantable timber had been cut, the court properly refused to peremptorily instruct the jury to find for plaintiff on the question of statutory penalty even though plaintiff had testified that after he had warned defendant's workmen not to cross his line and deaden any timber on his land, some of the trees had been poisoned, but made no showing of the kind or how many trees, if any, had been poisoned after the warning. Strawbridge v. Day, 232 Miss. 42, 98 So. 2d 122, 1957 Miss. LEXIS 442 (Miss. 1957).

In an action against a minor and his parents for personal injuries arising out of a motor vehicle accident, where there was no proof that the father or mother authorized or knowingly permitted the minor to drive on the occasion in question, the trial court properly peremptorily instructed the jury to return a verdict for the parents. Prewitt v. Walker, 231 Miss. 860, 97 So. 2d 514, 1957 Miss. LEXIS 575 (Miss. 1957).

Plaintiff was entitled to a peremptory instruction where it appeared that defendant, at the speed he was traveling, was following too closely to the car preceding him, which stopped, causing defendant to enter into the opposite lane of traffic and collide head-on with the truck in which plaintiff's decedent was riding, and defendant's negligence proximately caused the collision and death; and defendant could not invoke the sudden emergency rule since his own testimony showed that the emergency was caused by his own fault. Meeks v. McBeath, 231 Miss. 504, 95 So. 2d 791, 1957 Miss. LEXIS 535 (Miss. 1957).

The trial court properly refused defendant a peremptory instruction where, in an action for a personal injury sustained when the truck in which plaintiff was a passenger was struck by defendant's automobile while undertaking to turn from the right lane of traffic across the oncoming traffic lane to enter a driveway, the jury was warranted in finding that the truck driver's movements were consistent with reasonable safety as required by Code 1942, § 8192, and that defendant's negligence was the contributing, if not the sole, cause of accident. Hamilton v. McCry, 229 Miss. 481, 91 So. 2d 564, 1956 Miss. LEXIS 629 (Miss. 1956).

In an action of bastardy, where there was no substantial dispute as to the defendant being the father of the child, the court correctly granted a peremptory instruction for the mother. Thomas v. Cook, 229 Miss. 458, 91 So. 2d 275, 1956 Miss. LEXIS 627 (Miss. 1956).

Where defendant testified that when he had stopped prior to entering the through street he had seen plaintiff's car approaching thereon at a distance of about 100 yards and traveling at about 40 miles per hour, but that he did not look any further before slowly driving onto the through street where the collision occurred, plaintiff was entitled to a peremptory instruction in his action for personal injuries sustained as a result of the collision. Wells v. Bennett, 229 Miss. 135, 90 So. 2d 199, 1956 Miss. LEXIS 594 (Miss. 1956).

Where the insured had presented sufficient evidence, which together with the logical inferences therefrom, if taken to be true, would have substantiated his claim that he was suffering on account of paralysis agitans or Parkinson's disease, the court properly refused the insurer's motion for a peremptory instruction. Brotherhood of Railroad Trainmen Ins. Dept., Inc. v. McLemore, 228 Miss. 579, 89 So. 2d 629, 1956 Miss. LEXIS 549 (Miss. 1956).

Motion for peremptory instruction to jury made at end of all testimony should not be sustained unless evidence of movant overwhelms by its weight proof of opposite party. Wagley v. Colonial Baking Co., 208 Miss. 815, 45 So. 2d 717, 1950 Miss. LEXIS 304 (Miss. 1950).

In determining right of defendant to peremptory instruction to recover for death of customer allegedly caused by ptomaine poisoning, the court must assume as true everything which the evidence establishes either directly or by reasonable inferences which the jury might reasonably draw from such evidence, subject to the limitation, however, that a presumption cannot arise from another presumption. Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397, 1949 Miss. LEXIS 349 (Miss. 1949).

Where the evidence clearly showed that the deceased was beating the driver of an automobile at the time of an accident in which he was killed and evidence that the accident was due to another cause was speculative, a peremptory instruction in favor of an insurance company seeking to avoid payment of double indemnity should have been given. Equitable Life Assurance Soc. v. Mitchell, 201 Miss. 696, 29 So. 2d 88, 1947 Miss. LEXIS 439 (Miss. 1947).

Failure of the insured and his wife to reply to a letter from the insurer that the insured was not the sole and unconditional owner of an automobile lost by theft and fire as contemplated by the policy did not entitle the insurer to a peremptory instruction where the letter left in doubt whether liability would be denied. St. Paul Fire & Marine Ins. Co. v. Staten, 200 Miss. 197, 26 So. 2d 538, 1946 Miss. LEXIS 283 (Miss. 1946).

This statute [Code 1942, § 1530] which forbids judges to comment on the evidence or to give any charge unless requested by one of the parties, leaves unaffected the judicial authority to direct a verdict. Jakup v. Lewis Grocer Co., 190 Miss. 444, 200 So. 597, 1941 Miss. LEXIS 65 (Miss. 1941); Perry v. Clarke, 6 Miss. 495, 1841 Miss. LEXIS 24 (Miss. 1841).

Everything must be considered as proved which the evidence establishes either directly or by reasonable inference against party who asks peremptory instructions. Dean v. Brannon, 139 Miss. 312, 104 So. 173, 1925 Miss. LEXIS 160 (Miss. 1925); McKinnon v. Braddock, 139 Miss. 424, 104 So. 154, 1925 Miss. LEXIS 149 (Miss. 1925); New Orleans & N. E. R. Co. v. Jackson, 140 Miss. 375, 105 So. 770, 1925 Miss. LEXIS 271 (Miss. 1925); New Orleans & N. E. R. Co. v. Martin, 140 Miss. 410, 105 So. 864, 1925 Miss. LEXIS 274 (Miss. 1925); Wise v. Peugh, 140 Miss. 479, 106 So. 81, 1925 Miss. LEXIS 283 (Miss. 1925); Gulf & S. I. R. Co. v. Hales, 140 Miss. 829, 105 So. 458, 1925 Miss. LEXIS 313 (Miss. 1925); St. Louis & S. F. R. Co. v. Nixon & Phillips, 141 Miss. 677, 105 So. 478, 1925 Miss. LEXIS 184 (Miss. 1925); Yates v. Houston & Murray, 141 Miss. 881, 106 So. 110, 1925 Miss. LEXIS 215 (Miss. 1925); Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946); Davidson v. McIntyre, 202 Miss. 325, 32 So. 2d 150, 1947 Miss. LEXIS 281 (Miss. 1947); Triangle Amusement Co. v. Benigno, 35 So. 2d 454 (Miss. 1948); Thomas v. Mississippi Products Co., 208 Miss. 506, 44 So. 2d 556, 1950 Miss. LEXIS 267 (Miss. 1950); Allgood v. United Gas Corp., 204 Miss. 94, 37 So. 2d 12, 1948 Miss. LEXIS 346 (Miss. 1948); Bankston v. Dumont, 205 Miss. 272, 38 So. 2d 721, 1949 Miss. LEXIS 429 (Miss. 1949); Wagley v. Colonial Baking Co., 208 Miss. 815, 45 So. 2d 717, 1950 Miss. LEXIS 304 (Miss. 1950); Stoner v. Colvin, 236 Miss. 736, 110 So. 2d 920, 1959 Miss. LEXIS 371 (Miss. 1959); Statham v. Blaine, 234 Miss. 649, 107 So. 2d 93, 1959 Miss. LEXIS 575 (Miss. 1959); Priest v. Avent, 236 Miss. 202, 109 So. 2d 643, 1959 Miss. LEXIS 309 (Miss. 1959).

The court cannot direct verdict for either party when the evidence would authorize jury to find for the other. Taylor v. Desoto Lumber Co., 137 Miss. 829, 102 So. 260, 1924 Miss. LEXIS 219 (Miss. 1924).

A case in which plaintiff was entitled to a peremptory instruction with reference to cotton sales and transactions. Dillard & Coffin Co. v. Jennings, 132 Miss. 370, 96 So. 307, 1923 Miss. LEXIS 52 (Miss. 1923).

Where the proof of injury and the cause thereof is not certain and conclusive it is error for the court to direct a verdict. Davis v. Day, 127 Miss. 140, 89 So. 814, 1921 Miss. LEXIS 204 (Miss. 1921).

A peremptory instruction should be given against plaintiff where the evidence shows he acquired the cause of action two days after bringing the suit. St. Paul Fire & Marine Ins. Co. v. W. H. Daniel Auto Co., 121 Miss. 745, 83 So. 807, 1920 Miss. LEXIS 118 (Miss. 1920).

In determining the propriety of a peremptory instruction the evidence is to be taken most strongly against him who asks it. American Trading Co. v. Ingram-Day Lumber Co., 110 Miss. 31, 69 So. 707, 1915 Miss. LEXIS 9 (Miss. 1915); Triangle Amusement Co. v. Benigno, 35 So. 2d 454 (Miss. 1948).

A case occurring within the state of Tennessee in which it held a directed verdict for defendant was error. Turner v. Southern R. Co., 112 Miss. 359, 73 So. 62, 1916 Miss. LEXIS 119 (Miss. 1916).

On a peremptory instruction being granted it is not essential that the jury retire but the verdict may be entered up without the jury's action. Schaffer v. Deemer Mfg. Co., 108 Miss. 257, 66 So. 736, 1914 Miss. LEXIS 198 (Miss. 1914); Edwards v. Yazoo & M. V. R. Co., 112 Miss. 791, 73 So. 789, 1916 Miss. LEXIS 176 (Miss. 1916), overruled, Hattiesburg Butane Gas Co. v. Griffin, 206 So. 2d 845, 1968 Miss. LEXIS 1590 (Miss. 1968).

If the evidence shows plaintiff entitled to recover on one item sued for he should have peremptory instruction as to such item. McFadden v. Buckley, 98 Miss. 28, 53 So. 351, 1910 Miss. LEXIS 39 (Miss. 1910).

It is error to give peremptory instruction on a point on which the testimony is conflicting. Romano v. Vicksburg R. & L. Co., 39 So. 781 (Miss. 1906); T. B. Bonner Co. v. New Orleans & N. E. R. Co., 40 So. 65 (Miss. 1906); Elledge v. Gray, 41 So. 2 (Miss. 1906); Bell v. Southern R. Co., 94 Miss. 440, 49 So. 120, 1909 Miss. LEXIS 369 (Miss. 1909); Bryant v. Enochs Lumber & Mfg. Co., 94 Miss. 454, 49 So. 113, 1909 Miss. LEXIS 365 (Miss. 1909); Skipwith v. Mobile & O. R. Co., 95 Miss. 50, 48 So. 964, 1909 Miss. LEXIS 253 (Miss. 1909); Byers v. McDonald, 99 Miss. 42, 54 So. 664, 1910 Miss. LEXIS 11 (Miss. 1910); Bolling v. Red Snapper Sauce Co., 97 Miss. 785, 53 So. 394, 1910 Miss. LEXIS 295 (Miss. 1910); Dodge v. Cutrer, 101 Miss. 844, 58 So. 208, 1912 Miss. LEXIS 1 (Miss. 1912); Hardy v. Masonic Ben. Ass'n, 103 Miss. 108, 60 So. 48, 1912 Miss. LEXIS 142 (Miss. 1912); Walker v. L. N. Dantzler Lumber Co., 103 Miss. 826, 60 So. 1013, 1912 Miss. LEXIS 237 (Miss. 1912); Mobile & O. R. Co. v. Carpenter, 104 Miss. 706, 61 So. 693, 1913 Miss. LEXIS 76 (Miss. 1913); Offutt v. Barrett, 106 Miss. 31, 63 So. 333, 1913 Miss. LEXIS 104 (Miss. 1913); Waldrop & Thomas v. O. B. Crittenden & Co., 107 Miss. 595, 65 So. 644, 1914 Miss. LEXIS 124 (Miss. 1914); National Life & Acci. Ins. Co. v. De Vance, 110 Miss. 196, 70 So. 83, 1915 Miss. LEXIS 23 (Miss. 1915); Jones v. Knotts, 110 Miss. 590, 70 So. 701, 1915 Miss. LEXIS 85 (Miss. 1915); Wynnegar v. Southwestern Co., 120 Miss. 675, 83 So. 3, 1919 Miss. LEXIS 122 (Miss. 1919); Buie v. Cloy, 127 Miss. 719, 90 So. 446, 1921 Miss. LEXIS 275 (Miss. 1921); Brenard Mfg. Co. v. Baird, 141 Miss. 110, 106 So. 82, 1925 Miss. LEXIS 208 (Miss. 1925); Yazoo & M. V. R. Co. v. Lucken, 137 Miss. 572, 102 So. 393, 1925 Miss. LEXIS 5 (Miss. 1925); Trotter v. Staggers, 201 Miss. 9, 28 So. 2d 237, 1946 Miss. LEXIS 352 (Miss. 1946); Frederick Smith Enterprise Co. v. Lucas, 204 Miss. 43, 36 So. 2d 812, 1948 Miss. LEXIS 341 (Miss. 1948); Jackson City Lines v. Harkins, 204 Miss. 707, 38 So. 2d 102, 1948 Miss. LEXIS 399 (Miss. 1948); Scoggins v. Vicksburg Hospital, Inc., 229 Miss. 770, 91 So. 2d 837, 1957 Miss. LEXIS 324 (Miss. 1957); Walters v. Fine, 232 Miss. 494, 99 So. 2d 669, 1958 Miss. LEXIS 299 (Miss. 1958); Ables v. Curle, 233 Miss. 369, 102 So. 2d 122, 1958 Miss. LEXIS 393 (Miss. 1958).

Court may give peremptory instruction where no other verdict could reasonably have been allowed to stand. Wooten v. Mobile & O. R. Co., 89 Miss. 322, 42 So. 131, 1906 Miss. LEXIS 6 (Miss. 1906); Clark v. J. L. Moyse & Bro., 48 So. 721 (Miss. 1909); Fletcher v. Sovereign Camp, W. O. W., 81 Miss. 249, 32 So. 923, 1902 Miss. LEXIS 131 (Miss. 1902).

A peremptory instruction will be error unless the evidence conceding it to be absolutely true discloses no legal right in the party against whom the instruction is given. Fore v. Alabama & V. R. Co., 87 Miss. 211, 39 So. 493, 1905 Miss. LEXIS 117 (Miss. 1905).

A motion to exclude the evidence and instruct for defendant is analogous to a demurrer to the evidence, and in the main is governed by the same rules. Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786, 1905 Miss. LEXIS 89 (Miss. 1905).

A motion to exclude the evidence should never be allowed unless the same is plainly and unmistakably insufficient to maintain the issue, nor except in cases where the court would feel constrained to set aside a verdict for the opposite party as unwarranted by the evidence. Ander-

son v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786, 1905 Miss. LEXIS 89 (Miss. 1905); Flora v. American Express Co., 92 Miss. 66, 45 So. 149, 1907 Miss. LEXIS 9 (Miss. 1907); Illinois C. R. Co. v. Fowler, 123 Miss. 826, 86 So. 460, 1920 Miss. LEXIS 85 (Miss. 1920).

A peremptory instruction should not be given for the defendant if the state of the evidence is such that they would not vacate a verdict predicated thereon in plaintiff's favor. Rhymes v. Jackson Electric R., L. & P. Co., 85 Miss. 140, 37 So. 708, 1904 Miss. LEXIS 143 (Miss. 1904); Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786, 1905 Miss. LEXIS 89 (Miss. 1905).

18. Modification or withdrawal.

In a wrongful death action, error could not be predicated upon the fact that the trial judge had granted an instruction requested by appellants only after the appellants had been forced to amend the instruction to obviate an objection by the judge to the form in which it had been presented, the appellants' acceptance and use of the instruction as amended constituting a waiver of the error, if any, in the trial court's action is suggesting or requiring the amendment. McCollum v. Randolph, 220 So. 2d 310, 1969 Miss. LEXIS 1452 (Miss. 1969).

Defendant cannot complain of a modified instruction as being erroneous where he used the instruction as modified on the trial. Holmes v. State, 192 Miss. 54, 4 So. 2d 540, 1941 Miss. LEXIS 12 (Miss. 1941).

Judge may modify incorrect instructions presented to conform to law. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223, 1932 Miss. LEXIS 52 (Miss. 1932).

An instruction asked and modified by the court and read to the jury by the party requesting it cannot be complained of by said party. Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348, 1910 Miss. LEXIS 38 (Miss. 1910).

A correct instruction requested and modified by the court may be complained of by a party asking it. Coleman v. Yazoo & M. V. R. Co., 90 Miss. 629, 43 So. 473, 1907 Miss. LEXIS 70 (Miss. 1907).

19. Cure of error.

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court's error in refusing a jury instruction that the defendant truck driver was negligent as a matter of law due to intoxication was cured by the jury finding in favor of the plaintiff. Hasson v. Hale, 555 So. 2d 1014, 1990 Miss. LEXIS 6 (Miss. 1990).

A jury instruction in a medical malpractice case stating that the jury was required to find that the defendant physician deviated from the standard of care required of him and that the deviation was the proximate cause of the plaintiff's injuries, was not defective for failure to include language requiring the jury to make their findings "from the evidence" where 5 other instructions stated that the jury was to make its findings based upon the evidence. Hudson v. Taleff, 546 So. 2d 359, 1989 Miss. LEXIS 299 (Miss. 1989).

Where vice, if any, in appellee's instruction to the jury was cured by the instructions obtained by the appellant, Supreme Court would overrule suggestion of error. New Orleans & N. R. Co. v. Boliver, 44 So. 2d 527 (Miss. 1950).

Refusal to grant instruction to which one is entitled is cured by granting of instruction of similar import. Koestler v. Burton, 207 Miss. 40, 41 So. 2d 362, 1949 Miss. LEXIS 315 (Miss. 1949), overruled, Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541, 1951 Miss. LEXIS 458 (Miss. 1951).

In action against charity hospital, instruction of which emphasizes almost to exclusion of any other theory that issue involved is negligence of defendant's nurses is not cured by instruction for defendant based upon proper theory of liability which involves negligence in selection and employment of nurses when the inconsistency between instructions causes confusion. International Order of Twelve of Knights, etc. v. Barnes, 204 Miss. 333, 37 So. 2d 487, 1948 Miss. LEXIS 371 (Miss. 1948).

Construction of all of the instructions as a whole will not cure an instruction that is contradictory of the other instructions and entirely contrary to the law. Wallace v. Billups, 203 Miss. 853, 33 So. 2d 819, 1948 Miss. LEXIS 329 (Miss. 1948).

Instruction that if the jury were reasonably satisfied from a preponderance of the evidence that the defendant committed the fraud complained of, verdict should be rendered for plaintiff was erroneous, and conflicting irreconcilable instruction, on behalf of defendant, that fraud must be shown by clear and convincing evidence, did not cure the error. Hunt v. Sherrill, 195 Miss. 688, 15 So. 2d 426, 1943 Miss. LEXIS 153 (Miss. 1943).

An instruction contrary to the law of the case may not be cured by other instructions. Alabama & V. R. Co. v. Cox, 106 Miss. 33, 63 So. 334, 1913 Miss. LEXIS 105 (Miss. 1913).

An instruction may be so defective as to constitute reversible error and cannot be cured by another instruction. Mahaffey Co. v. Russell & Butler, 100 Miss. 122, 54 So. 807, 1911 Miss. LEXIS 92 (Miss. 1911); Godfrey v. Meridian R. & L. Co., 101 Miss. 565, 58 So. 534, 1911 Miss. LEXIS 172 (Miss. 1911).

Instruction in res ipsa loquitur case that burden was on defendant to rebut the presumption did not mislead jury when considered with other instructions charging that the burden of proof was upon plaintiff and that he must prove his allegations by a preponderance of the evidence. Alabama & V. R. Co. v. Groome, 97 Miss. 201, 52 So. 703, 1910 Miss. LEXIS 268 (Miss. 1910).

A correct emphatic instruction for proponent of a will correct a slight error in another instruction given for contestants. Hitt v. Terry, 92 Miss. 671, 46 So. 829, 1908 Miss. LEXIS 252 (Miss. 1908).

Error in instructions authorizing jury to assess the damages at whatever amount they might think plaintiff was entitled to receive, was not reversible where another instruction stated the matter correctly as entitling plaintiff only to such damages as testimony might warrant. Mississippi C. R. Co. v. Magee, 93 Miss. 196, 46 So. 716, 1908 Miss. LEXIS 107 (Miss. 1908).

An erroneous modification of an instruction may be cured by another instruction correctly stating the rule of law. American Cent. Ins. Co. v. Antram, 88 Miss. 518, 41 So. 257, 1906 Miss. LEXIS 171 (Miss. 1906); Hitt v. Terry, 92 Miss. 671, 46 So. 829, 1908 Miss. LEXIS 252 (Miss. 1908); Mississippi C. R. Co. v. Magee, 93 Miss. 196, 46 So. 716, 1908 Miss. LEXIS 107 (Miss. 1908); Cumberland Tel. & Tel. Co. v. Jackson, 95 Miss. 79, 48 So. 614, 1909 Miss. LEXIS 225 (Miss. 1909); Alabama & V. R. Co. v. Groome, 97 Miss. 201, 52 So. 703, 1910 Miss. LEXIS 268 (Miss. 1910); Yazoo & M. V. R. Co. v. Kelly, 98 Miss. 367, 53 So. 779, 1910 Miss. LEXIS 73 (Miss. 1910); Southern R. Co. v. Ganong, 99 Miss. 540, 55 So. 355, 1911 Miss. LEXIS 226 (Miss. 1911); Mississippi C. R. Co. v. Pillows, 101 Miss. 527, 58 So. 483, 1911 Miss. LEXIS 167 (Miss. 1911).

20. Subject matter of instructions.

21. —Credibility of witnesses.

The trial court's instruction in an eminent domain case, that the landowner is a competent witness in his behalf and that the jury should consider his testimony along with all of the rest of the testimony in the case, constituted an improper comment on the weight of the evidence and invaded the province of the jury; the court's instruction, advising the jury that the opinion of experts as to values in eminent domain cases are "not to be passively received and blindly followed", denigrated the testimony of the expert witnesses in negative phraseology and was erroneous, particularly in view of the prior instruction in positive phraseology that the jury "should consider" the testimony of the landowner. Mississippi State Highway Com. v. Robertson, 350 So. 2d 1348, 1977 Miss. LEXIS 2247 (Miss. 1977).

An instruction that if the jury should believe from the evidence that any witness who testified in the case was interested in the result of the suit as a party or otherwise, the jury, in determining the credit to be given such witness, might take into consideration such interest as the evidence showed the witness had, violated this section [Code 1942, § 1530], although under the circumstances, the error was harmless. Hoxie v. Hadad, 193 Miss. 896, 11 So. 2d 693, 1943 Miss. LEXIS 18 (Miss. 1943).

Although the disability of a party from testifying because of his interest has been removed by statute, such statute does not justify an instruction to the jury in violation of this section. Hoxie v. Hadad, 193

Miss. 896, 11 So. 2d 693, 1943 Miss. LEXIS 18 (Miss. 1943).

Instruction of falsus in uno, falsus in omnibus, while erroneous, will not constitute reversible error where no jury of fair, honest and reasonable men could have reached a different verdict. Sikes v. Thomas, 192 Miss. 647, 7 So. 2d 527, 1942 Miss. LEXIS 58 (Miss. 1942).

Instruction that if jury believed from preponderance of the evidence that any witness had knowingly, wilfully and corruptly testified falsely as to any material facts in the case, then the jury might disregard the testimony of such witness entirely was erroneous. Dixie Stock Yard, Inc. v. Ferguson, 192 Miss. 166, 4 So. 2d 724, 1941 Miss. LEXIS 19 (Miss. 1941).

Where there was sharp conflict between testimony of plaintiff and defendant's witness, refusing instruction regarding credit to be given any witness interested in result of suit as party or otherwise was error. Yazoo & M. V. R. Co. v. Alexander, 182 Miss. 654, 179 So. 266, 1938 Miss. LEXIS 131 (Miss. 1938).

Although the jury is the judge of the credibility of witnesses, courts will not permit verdict to stand where testimony of witnesses is arbitrarily disregarded by the jury. Mobile, J. & K. C. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142, 1908 Miss. LEXIS 218 (Miss. 1908).

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular without embodying the limitation that such false swearing must have been done wilfully, knowingly and corruptly. Sardis & D. R. Co. v. McCoy, 85 Miss. 391, 37 So. 706, 1904 Miss. LEXIS 142 (Miss. 1904).

22. — Negligence, generally.

A jury instruction in a medical malpractice case which stated that a surgeon is not an insurer or guarantor of favorable results, and that the mere fact that a less than desirable result followed the defendant doctor's surgery did not, in itself, require the jury to find that the doctor was liable, was proper. Hudson v. Taleff, 546 So. 2d 359, 1989 Miss. LEXIS 299 (Miss. 1989).

A jury instruction in a negligence action arising from an automobile accident that required the defendant to "decrease her speed as may be necessary to avoid colliding with any person, vehicle, or other conveyance on the highway in compliance with legal requirements" was erroneous because it placed a higher burden on the defendant than that of reasonable care. Similarly, an instruction that required the defendant to be "vigilant and to anticipate the presence of vehicles at all times and under all circumstances" was erroneous for the same reason, and also warranted reversal and remand of the case. Turner v. Turner, 524 So. 2d 942, 1988 Miss. LEXIS 201 (Miss. 1988).

Plaintiff's instruction in wrongful death action that power company was required to maintain its lines in such a manner as to prevent it from being dangerous to the public, was incorrect for if it were required to do so, a power company would be an insurer against all injury to persons and property. Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 1973 Miss. LEXIS 1291 (Miss. 1973).

Instruction that the driver of a motor vehicle does not have the right to a clear and unobstructed highway, but must constantly keep the automobile being then and there driven by her under control, must continue on the alert, must keep a proper lookout ahead and anticipate the presence of other persons and vehicles upon the highway and must, at all times, drive her motor vehicle at such rate of speed to enable her to avoid injury to such person, when they come, or by the exercise of ordinary care, would come within her vision or under her observation, was reversible error. Kimbrough v. L. B. Lampton Co., 283 So. 2d 599, 1973 Miss. LEXIS 1234 (Miss. 1973).

Where a landowner alleged and presented testimony to the effect that a municipality was responsible for sewage invading his land where his cows consumed a quantity of the same resulting in the death of some of them, the landowner made out a case of absolute liability, and the allegation of negligence was surplusage and instructions which may not have adequately defined negligence or set forth acts or omissions constituting negligence were mere surplusage. Town of Fulton v. Mize, 274 So. 2d 129, 1973 Miss. LEXIS 1586 (Miss. 1973).

In an automobile collision case, where there was evidence that the defendant had been speeding and driving while intoxicated, an instruction that liability rested not upon danger but upon negligence was reversible error, since such instruction could have allowed the jury to conclude that although it was dangerous to drive under the influence of intoxicants or at a high rate of speed, that did not mean that the defendant was negligent. Freeze v. Taylor, 257 So. 2d 509, 1972 Miss. LEXIS 1459 (Miss. 1972).

An instruction stating that the jury could not return a verdict against the administratrix if it found that an automobile collision resulted from the negligence of a person other than the deceased driver, but which did not designate any person other than that driver who might be charged with negligence, and did not state alleged acts of negligence, nor define them, was reversibly erroneous. Knighton v. Knighton, 253 So. 2d 846, 1971 Miss. LEXIS 1234 (Miss. 1971).

In a personal injury suit, instructions which required the defendant overtaking motorist under all circumstances to be diligent and to anticipate the presence of others, and placing an absolute duty to pass safely and to avoid injury to others on such defendant, who collided with an oncoming motorist, were erroneous in placing a higher standard or care on the defendant than required by law and providing no factual guide for determining his negligence, since the standard of the law is reasonable care. Acord v. Moore, 243 So. 2d 55, 1971 Miss. LEXIS 1501 (Miss. 1971).

When the plaintiff's automobile collided with the defendant's automobile which was stopped on the road as a result of an earlier accident caused by the defendant's negligence, the court properly denied an instruction requested by the defendant that the driver of plaintiff's automobile was guilty of negligence as a matter of law, which instruction was based on the common-law rule that the operator of a motor vehicle must drive at such a speed as to be able to stop within the range of his vision, the court noting that the "range of vision" rule was not a hard and fast rule which would preclude recovery in every case. Huff v. Boyd, 242 So. 2d 698, 1971 Miss. LEXIS 1496 (Miss. 1971).

An instruction to the effect that the defendant driver, who claimed that he lost consciousness because of a stroke immediately before the accident, was required to prove that he had taken precautions to guard against the sudden onset of total physical disability was reversible error, where physicians testified that the defendant could not have foreseen the onset of a stroke. Warren v. Pinnix, 241 So. 2d 662, 1970 Miss. LEXIS 1355 (Miss. 1970).

In a malpractice action arising out of the loss of a leg from clotting, the language of an instruction stating that liability must be based upon negligence "in connection with a transfusion procedure" was sufficiently broad to include failing to observe or look at the leg, particularly in view of instructions stating that the patient could recover if it could be found that the doctor "failed to exercise reasonable care under the prevailing circumstances to observe the left leg" while administering the transfusion. Chapman v. Carlson, 240 So. 2d 263, 1970 Miss. LEXIS 1280 (Miss. 1970).

In an action for injuries sustained in a collision which occurred when the defendant motorist was attempting to overtake the plaintiff motorcyclist, an instruction that if the defendant had a right to pass the plaintiff, and he was not speeding, he was not required by law to blow his horn unless the plaintiff was at the time giving a signal indicating his intention to turn from a straight path travel, was erroneous, where it was undisputed that at the time the defendant attempted to overtake the plaintiff the motorcycle was rapidly slowing down, since such activity of the motorcyclist would have indicated to a reasonable and prudent man situated in a following vehicle traveling at a rapid rate of speed that it was reasonably necessary to insure safe operation to give audible warning with his horn. McHale v. Daniel, 233 So. 2d 764, 1970 Miss. LEXIS 1666 (Miss. 1970).

In an action for personal injuries, an instruction that the driver of a pickup truck, which ran over a motorcyclist after he had been thrown to the highway following a collision with the defendant's automobile, was negligent in the operation of his truck, and if the jury believed from a preponderance of the evidence that the negligence of the truck driver contributed to the motorcyclist's injury, then the defendant was not responsible for such of the motorcyclist's injuries which were caused by the negligence of the truckdriver unless the jury should believe from a preponderance of the evidence that such negligence was foreseeable by the defendant, could not be construed as being in effect a peremptory instruction to find for the defendant. Ratliff v. Nail, 231 So. 2d 798, 1970 Miss. LEXIS 1611 (Miss. 1970).

In an action against a garage and a tire company for personal injuries and property damage resulting when a wheel came off, an instruction to the effect that the fact that an accident occurred and the plaintiff was injured constituted no evidence whatever of any negligence on the part of the defendants was improper as removing the circumstance or fact of the accident from consideration by the jury. Bigelow v. Sports Cars, Ltd., 221 So. 2d 108, 1969 Miss. LEXIS 1492 (Miss. 1969).

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house, a jury instruction to the effect that the jury should find for the laborer if the contractor saw the laborer standing against the wall of the chicken house and failed to stop the truck and continued to back the truck until it pinned the laborer against the wall resulting in bodily injuries to the laborer, was properly given. Smith v. Jones, 220 So. 2d 829, 1969 Miss. LEXIS 1479 (Miss. 1969).

In an action arising from a train-automobile collision, an instruction to the effect that the engineer operating the train had no right under the law to run it across the intersection in question at a greater rate of speed than was reasonably prudent or careful at the time, taking into consideration all of the facts and circumstances, was not erroneous for failing to give the jury any guide to what was a reasonable or prudent rate of speed, where the facts were sufficient to warrant the jury in finding that the intersection was unusually hazardous and that the speed of 52 miles an hour at which the train was proceeding through a town was not a reasonable and prudent rate of speed. Illinois C. R. Co. v. Pilgrim, 220 So. 2d 598, 1969 Miss. LEXIS 1465 (Miss. 1969).

An instruction in an automobile accident case that the operator of a vehicle must at all times drive his motor vehicle at such a rate of speed and in such a manner as to enable him to avoid injury to anyone who might come within the vision of the operator, was subject to criticism in that it virtually made the operator absolutely liable to anyone under any circumstances for any injury occasioned by the use of the vehicle, when the proper standard is the exercise of ordinary care on the part of the automobile driver to observe persons or objects within his traffic lane or in close proximity, and to avoid injury to persons or property within his vision or under his observation. Stewart v. White, 220 So. 2d 271, 1969 Miss. LEXIS 1439 (Miss. 1969).

An instruction that a motorist operating his vehicle on a county road had an absolute duty, before turning across the road into the opposite lane of traffic to use reasonable care to determine if any other vehicles were occupying the opposite lane improperly qualified the word "duty" by the word "absolute." Niles v. Sanders, 218 So. 2d 428, 1969 Miss. LEXIS 1599 (Miss. 1969).

Court's instruction for plaintiff that it was the duty of the driver of defendant's truck at all times to maintain a reasonably safe and proper distance between his vehicle and any vehicle proceeding in front of his truck, that it was his duty to anticipate that preceding vehicles would slow or would stop on the highway, and that it was his duty to keep the truck under reasonable control at all times and to take reasonable precautions commensurate with the type of vehicle and load thereon, imposed no absolute liability on the truckdriver for the consequences of his actions. Bill Hunter Truck Lines, Inc. v. Jernigan, 384 F.2d 361, 1967 U.S. App. LEXIS 4789 (5th Cir. Miss. 1967).

An instruction that the operator of a vehicle continuing its course is bound to have his vehicle under such control that another vehicle, entering the intersection first, can safely make the left turn, is improper as making such operator the insurer of the other's safety without regard to whether such other had at the time a right to turn across the traffic lane, and without regard to whether or not he was in such close proximity to the intersection as to constitute an immediate hazard. Greenville Ice & Coal Co. v. Brown, 236 Miss. 253, 109 So. 2d 858, 1959 Miss. LEXIS 315 (Miss. 1959).

An instruction that the driver of an oncoming truck who saw a car signalling at a controlled-traffic intersection for a left turn but continued on a green light was bound to know that the car's driver contemplated turning, is objectionable as ignoring whatever right the truck driver had to assume that the car would wait until the traffic lane was clear. Greenville Ice & Coal Co. v. Brown, 236 Miss. 253, 109 So. 2d 858, 1959 Miss. LEXIS 315 (Miss. 1959).

In a malpractice action, an instruction which announced the rule as to the standards of skill and care required of physicians and surgeons, and further told a jury that if they believed from a preponderance of the testimony that the defendant failed to use and exercise such reasonable and ordinary care, skill and diligence in diagnosing, treating and operating on the plaintiff, and that the plaintiff was injured and damaged thereby, she was entitled to recover, was approved. Copeland v. Robertson, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

An instruction calling for a court ruling that the driver of a truck which struck a car ahead, halted by a traffic light, when the brakes failed to hold, was negligent as a matter of law, is properly refused as lacking the qualification that the failure of the brakes must have been attributable to negligence. Phillips v. Delta Motors Lines, Inc., 235 Miss. 1, 108 So. 2d 409, 1959 Miss. LEXIS 397 (Miss. 1959).

An instruction that motorist in determining whether he could turn left with reasonable safety, may assume that another is approaching at a lawful speed, is defective in failing to inform jury that motorist could indulge in the assumption only until he knew, or should have known in the exercise of reasonable care, that the speed of the oncoming car was such that the turn could not be safely made. Cothern v. Brewer, 234 Miss. 676, 107 So. 2d 361, 1958 Miss. LEXIS 538 (Miss. 1958).

Instruction as to the duty of a motorist to anticipate the presence on a highway of other persons and vehicles, approved. Williams v. Moses, 234 Miss. 453, 106 So. 2d 45, 1958 Miss. LEXIS 517 (Miss. 1958).

In an action for damages resulting when defendant's truck-trailer unit ran into the rear end of plaintiff's truck-trailer unit on the curved portion of the highway, the court did not err in refusing to charge the defendant's driver with negligence in respect to speeding, overtaking on the right, and following too closely, particularly in view of Code 1942, § 1455. Green Truck Lines, Inc. v. Hooper, 233 Miss. 794, 103 So. 2d 443, 1958 Miss. LEXIS 441 (Miss. 1958).

In an action for injuries sustained by 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, instructions permitting the jury to find that the motorcycle had already entered the intersection at the time of the left turn, and was readily visible to the truck driver, was not reversible error, where, under conflicting evidence, the jury could and evidently did, reject the version of defendant's witnesses. City of Jackson v. Reed, 233 Miss. 304, 103 So. 2d 6, 1958 Miss. LEXIS 380 (Miss. 1958), overruled, City of Jackson v. Williamson, 740 So. 2d 818, 1999 Miss. LEXIS 89 (Miss. 1999).

In an action for personal injuries and property damages resulting from an intersectional collision, plaintiff's tendered instruction that every operator of an automobile had the right to assume and to act upon the assumption that persons driving other vehicles would exercise ordinary care and caution in traveling the streets, was properly refused as incomplete since it did not state that the plaintiff could rely upon the assumption that the defendant would exercise ordinary care and caution as she approached the intersection only until plaintiff knew or should have known in the exercise of ordinary care that defendant was not going to slow down or stop. Dame v. Estes, 233 Miss. 315, 101 So. 2d 644, 1958 Miss. LEXIS 382 (Miss. 1958).

An instruction that the law did not countenance blind reliance upon an automobile operator, approaching a stop sign, observing it, so, even if plaintiff was driving his automobile on a though street protected by stop signs, he did not have an unqualified privilege in the right of way, and was under a duty to observe due care in approaching and traversing the intersection, placed undue emphasis on plaintiff's duty to observe due care to avoid the collision and practically relieved the defendant from any duty to exercise due care at the intersection. Dame v. Estes, 233 Miss. 315, 101 So. 2d 644, 1958 Miss. LEXIS 382 (Miss. 1958).

In an action by property owners against the city, the court properly submitted to the jury the issue as to whether or not the city negligently caused or permitted the accumulation of sand and debris to the extent that it interfered with the natural flow of water and thus caused it to overflow and damage the plaintiff's property. City of Meridian v. Bryant, 232 Miss. 892, 100 So. 2d 860, 1958 Miss. LEXIS 346 (Miss. 1958).

In view of the uncontradicted evidence that when the motorist first saw the taxicab it had stopped and its headlights and taillights were burning, the trial court erred in submitting to the jury the issue of the alleged negligence of the taxicab driver in stopping upon the highway without giving any warning by hand signals, arm signals, blinker lights or other signals. Snowden v. Skipper, 230 Miss. 684, 93 So. 2d 834, 1957 Miss. LEXIS 410 (Miss. 1957).

In an action by plaintiff for injuries sustained in an intersectional automobile collision, the trial court correctly refused to instruct as to the duty of the defendant to turn to his right and avoid the collision, and to proclaim defendant's liability if the collision occurred east of the center line of the highway, where the evidence as to whether there was ample room upon the highway for defendant to have made a turn so as to have avoided the accident was conflicting, and defendant's evidence showed that he was on the right side of the highway at the time of the accident. Moore v. Herman Guy Auto Parts, Inc., 230 Miss. 189, 92 So. 2d 373, 1957 Miss. LEXIS 358 (Miss. 1957).

Trial court did not err in refusing to give an instruction that would have required a holding that defendant, who was traveling along a through highway, was guilty of negligence as a matter of law where the jury could have found that when plaintiff had entered the intersection, defendant was so close at hand that defendant could not possibly have stopped or averted the collision. Walton v. Owens, 244 F.2d 383, 1957 U.S. App. LEXIS 3100 (5th Cir. Miss. 1957).

Instructions in suit to recover for injuries sustained by defendant's employee that defendant owned its employee the nondelegable duty to exercise reasonable or ordinary care to furnish him with a reasonably safe place in which to work and with reasonably safe appliances upon and about which to work, though abstract, was not objectionable. Johns-Manville Products Corp. v. McClure, 46 So. 2d 539 (Miss. 1950).

In action for damages to automobile arising out of ramming by truck from rear, instruction that burden of proof is upon plaintiff to prove defendant was negligent "in the manner charged in the declaration," is erroneous because referring jurors to declaration for hypothesis upon which to rely, but not cause for reversal of case when other instructions, not in conflict therewith, are granted which incorporate in them the absent hypothesis omitted from this erroneous instruction. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

In an action for damages caused by the collapse of a building, the plaintiff is entitled to an instruction that mere proof of the collapse places a burden on the owner to make some explanation. Bloch v. Brown, 201 Miss. 653, 29 So. 2d 665, 1947 Miss. LEXIS 435 (Miss. 1947).

When negligence is the subject of the action, the instructions must confine the verdict to the ground or grounds of negligence alleged and in support of which there has been substantial proof. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

An instruction allowing jury to find negligence without giving a guide as to what specific acts or omissions within the pleadings and proof are sufficient to constitute actionable negligence, is erroneous. New Orleans & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. 2d 657, 1945 Miss. LEXIS 316 (Miss. 1945).

An instruction on negligence of employees of a railroad company may be made in general terms with reference to employees. St. Louis & S. F. R. Co. v. Ault, 101 Miss. 341, 58 So. 102, 1911 Miss. LEXIS 154 (Miss. 1911).

23. —Contributory negligence.

When a comparative negligence instruction is given, the jury should be instructed as to an alternative format for the rendering of a comparative negligence verdict which provides for an apportionment of fault or damages if both parties are found to be negligent. Burton v. Barnett, 615 So. 2d 580, 1993 Miss. LEXIS 90 (Miss. 1993).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court erred in granting a comparative negligence instruction where the only act of negligence claimed by the defendant truck driver was that the decedent drove her car onto his side of the highway since, if the jury had found the decedent negligent in driving onto the wrong side of the road, they would have been duty bound to find for the defendant. Hasson v. Hale, 555 So. 2d 1014, 1990 Miss. LEXIS 6 (Miss. 1990).

In an action arising out of an intersection accident, it was error to grant the defendant a comparative negligence instruction, based on the defendant's contention that the plaintiff was traveling at an excessive rate of speed at the intersection, where it was evident that the sole proximate cause of the collision was that the defendant ran a red light. Biddy v. State, 246 So. 2d 94, 1971 Miss. LEXIS 1393 (Miss. 1971).

An instruction given under the comparative negligence statute which does not define or set out any act which would constitute negligence on the part of either the plaintiff or the defendant is erroneous as a roving instruction and constitutes reversible error unless there is some other instruction which furnishes the jury a guide to the facts which would constitute negligence. Rayborn v. Freeman, 209 So. 2d 193, 1968 Miss. LEXIS 1446, 1968 Miss. LEXIS 1447 (Miss. 1968).

To instruct the jury for the plaintiff in an automobile collision action that the jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

In action for damages to automobile arising out of ramming by truck, instruction that even if jury believed from preponderance of evidence that defendant was guilty of negligence, jury also believed that plaintiff was negligent, jury should find for defendant or diminish plaintiff's actual damages in such proportion as plaintiff's negligence may have contributed to accident is erroneous and should not have been given. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

In action for damages to automobile arising out of ramming by truck, instruction that if jury believed from evidence that plaintiff and defendant were equally negligent, jury should find for defendant, is erroneous, for if both were negligent equally, defendant would not be absolved from liability altogether, but plaintiff's damages would be reduced by fifty per cent. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

The driver of an automobile, the windshield of which was covered with snow except for a small place which provided only vision straight ahead, who stopped before going onto a highway and then proceeded was not entitled to an instruction on contributory negligence of the driver of a vehicle traveling the highway who sounded his horn within 300 feet of the intersection upon seeing the stopped car. Trewolla v. Garrett, 200 Miss. 563, 27 So. 2d 887, 1946 Miss. LEXIS 323 (Miss. 1946).

An instruction allegedly ignoring the possibility of contributory negligence is not erroneous if neither party requested instructions on that point. Murphy v. Burney, 27 So. 2d 773 (Miss. 1946).

A charge given sufficiently covering the law of comparative negligence justifies a refusal to give another on the same point. Illinois C. R. Co. v. Nixon, 109 Miss. 308, 68 So. 466, 1915 Miss. LEXIS 155 (Miss. 1915).

The court cannot limit recovery on account of contributory negligence, where neither party requests such instruction. Yazoo & M. V. R. Co. v. Messina, 109 Miss. 143, 67 So. 963, 1915 Miss. LEXIS 127 (Miss. 1915), rev'd, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709, 1916 U.S. LEXIS 1461 (U.S. 1916).

Where neither party has requested an instruction with reference to diminishing damages on account of contributory negligence the plaintiff cannot complain at the failure of the court to give such instructions thereon. Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459, 1914 Miss. LEXIS 279 (Miss. 1914).

A case in which an instruction should have been given with reference to contributory negligence reducing damages sustained. Illinois C. R. Co. v. Handy, 108 Miss. 421, 66 So. 783, 1914 Miss. LEXIS 210 (Miss. 1914).

Unless defendant is guilty of gross negligence mere contributory negligence will not prevent recovery. Yazoo & M. V. R. Co. v. Carroll, 103 Miss. 830, 60 So. 1013, 1912 Miss. LEXIS 238 (Miss. 1912).

An instruction restricting a defense to contributory negligence held erroneous in that it withdrew from the jury the defense of due care and precaution on the part of the defendant. Yazoo & M. V. R. Co. v. Bruce, 98 Miss. 727, 54 So. 241, 1910 Miss. LEXIS 116 (Miss. 1910).

The jury must determine the question of contributory negligence of a child from his intelligence, age, knowledge and experience and it is error to restrict them to his intelligence. Potera v. Brookhaven, 95 Miss. 774, 49 So. 617, 1909 Miss. LEXIS 284 (Miss. 1909).

Where in an action for injuries, plaintiff's evidence and all just inferences to be drawn therefrom show that his own negligence contributed to produce the injury, it is the duty of the court, though the defendant introduces no proof to support a plea of contributory negligence, to instruct the jury, as a matter of law, that plaintiff cannot recover. Bridges v. Jackson E. R. L. & P. Co., 86 Miss. 584, 38 So. 788, 1905 Miss. LEXIS 90 (Miss. 1905).

24. —Proximate cause.

In a passenger action for injuries sustained in an automobile accident, an instruction to the effect that the jury might not return a verdict against the administratrix of the deceased driver if it should find from the evidence that the collision in question resulted solely, directly, and proximately from the negligence of a person other than the deceased driver was erroneously granted, since it did not designate any person other than the driver who might be charged with negligence, nor state the alleged acts of negligence, nor define them, leaving the jury to grope without direction for some unnamed person, guilty of some unexplained action which the jury might in its own fashion consider to be negligence. Dempsey v. Knighton, 244 So. 2d 721, 1971 Miss. LEXIS 1338 (Miss. 1971).

Where the defendant's disabled vehicle was in the highway as a result of an earlier collision caused by his negligence, and he had made no attempt to move it or warn oncoming traffic of its presence, an instruction for the plaintiff that the defendant's failure to remove or attempt to remove his automobile from the highway or to warn oncoming automobiles constituted negligence proximately causing or contributing to the automobile accident in question was properly allowed. Huff v. Boyd, 242 So. 2d 698, 1971 Miss. LEXIS 1496 (Miss. 1971).

In an automobile passenger's action for injuries, an instruction that if the jury should believe from a preponderance of the evidence that certain facts were true, then it could infer that the driver of the automobile was negligent and if such negligence proximately contributed to the accident then it should find for the plaintiff, should not have been given since the case was an inappropriate one for the application of the doctrine of res ipsa loquitur, but the instruction was not harmful to the defendant where the undisputed testimony and the physical facts overwhelmingly showed that the driver was negligent. Martin v. Capitol Broadcasting Co.,

233 So. 2d 217, 1970 Miss. LEXIS 1656 (Miss. 1970).

In an action brought for the alleged wrongful death of a minor bicyclist, an instruction granted defendant motorist to the effect that in event the jury found that no negligence on defendant's part had proximately caused or contributed to bicyclist's death, the occurrence insofar as defendant was concerned was an unavoidable accident for which he was not liable, did not incorrectly state the applicable law. McCollum v. Randolph, 220 So. 2d 310, 1969 Miss. LEXIS 1452 (Miss. 1969).

In a pedestrian's action for injuries sustained when he was struck by an automobile as he crossed a street, an instruction was erroneous which permitted the jury to rove the entire field of automobile negligence without regard to whether the negligence it might seize upon for a verdict was a proximate cause of the accident sued upon. Stewart v. White, 220 So. 2d 271, 1969 Miss. LEXIS 1439 (Miss. 1969).

An instruction which simply instructs the jury that if it believes from a preponderance of the evidence that defendant was negligent and his negligence was the proximate cause of the accident, the jury should find for the appellee, is fatally erroneous, for it wholly fails to designate what constitutes negligence so that the jury has no criteria by which it could determine whether or not the appellant was negligent. Mills v. Balius, 254 Miss. 353, 180 So. 2d 914, 1965 Miss. LEXIS 954 (Miss. 1965); Bush Constr. Co. v. Walters, 254 Miss. 266, 179 So. 2d 188, 1965 Miss. LEXIS 946 (Miss. 1965).

An instruction for the defendant in a wrongful death action that if the jury believes from the evidence that the injury and subsequent death of the plaintiff was proximately caused by the negligence, if any, of the plaintiff, then the jury should return a verdict for the defendant, is an erroneous instruction and in conflict with that provision of Code 1942, § 1454. Hogan v. Cunningham, 252 Miss. 216, 172 So. 2d 408, 1965 Miss. LEXIS 1092 (Miss. 1965).

An instruction in a case which the driver was confronted with an emergency, that it was the driver's duty to keep truck under reasonable control considering nature of highway and existing circumstances, and that failure to do so, if a proximate cause of collision, warranted a verdict for the other party, held in error. Summers v. Johnson, 236 Miss. 826, 105 So. 2d 451, 1958 Miss. LEXIS 280 (Miss. 1958).

An instruction that the driver of an automobile about to enter the highway from a private driveway must give the right of way to all vehicles approaching so closely on the highway as to constitute an immediate hazard, and, if the defendant negligently entered the highway from a private driveway at the time when plaintiff was approaching so closely as to constitute a hazard, and negligently failed to yield the right of way to the plaintiff, and such negligence, if any, proximately caused or contributed to the collision and to the damages, the jury should find for the plaintiff, properly presented the issues to the jury. Stewart v. Madden, 233 Miss. 206, 101 So. 2d 353, 1958 Miss. LEXIS 372 (Miss. 1958).

Where a motorist had approached an intersection with signal lights flashing red in her direction, and failed to stop before entering the intersection, the court properly submitted to the jury the issue as to whether such negligence was a sole cause of the collision. Bates v. Walker, 232 Miss. 804, 100 So. 2d 611, 1958 Miss. LEXIS 333 (Miss. 1958).

An instruction that if the driver of the car in which the plaintiff was riding negligently attempted to pass the defendant's vehicle within 100 feet of an intersection, and such negligence was the sole proximate cause of the accident, the jury could find for the defendant, was correct, where the defendant's proof showed that the attempt to pass was made within 50 or 60 feet of the intersection, and the intersection involved was one coming within the contemplation of the statute. Clark v. Mask, 232 Miss. 65, 98 So. 2d 467, 1957 Miss. LEXIS 445 (Miss. 1957).

The trial court committed reversible error in instructing that the driver of the car in which plaintiff was riding was guilty of negligence in driving his car into the intersection of a through highway without looking to the north immediately before doing so, and that judgment should be for defendants if such negligence were the proximate cause of the collision, where both plaintiff and the driver had testified that before entering the intersection they had looked both to the north and to the south. Moore v. Herman Guy Auto Parts, Inc., 230 Miss. 189, 92 So. 2d 373, 1957 Miss. LEXIS 358 (Miss. 1957).

Trial court's instruction that the uncontradicted proof showed that the truck owned and operated by the defendant was not equipped with clearance lights and sidemarker lights and reflectors as required by law, and that such failure to have the truck equipped was negligence on the part of the defendants, and that if such negligence proximately contributed to the collision, the jury should find for plaintiff, was not error, even though it may have had the effect of prejudicing the jury as against the defendants, since established facts can properly be assumed in the instruction. Arnold v. Reece, 229 Miss. 862, 92 So. 2d 237, 1957 Miss. LEXIS 335 (Miss. 1957).

Instruction that defendant driver was negligent in cutting corner of intersection and in failing to be on lookout in entering intersection so that jury should find for plaintiff motorist if they believed such negligence to be the proximate cause of a collision was improperly refused where there was nothing to prevent the two drivers from seeing the other's vehicle. Robinson v. Colotta, 199 Miss. 800, 26 So. 2d 66, 1946 Miss. LEXIS 248 (Miss. 1946).

25. —Assumption of risk.

An instruction as to assumption of the risk, which failed to include the essential requirements that the plaintiff passenger must have known and appreciated the risk before assuming it, was prejudicially erroneous. Knighton v. Knighton, 253 So. 2d 846, 1971 Miss. LEXIS 1234 (Miss. 1971).

In a passenger action for injuries sustained in an automobile accident, an assumption of the risk instruction that if the jury should believe that the driver on the occasion in question was under the influence of intoxicating alcohol or beer, that the passenger plaintiff assumed the risk of riding in the vehicle, was prejudicially erroneous where there was at most only a possible inference that the driver of the automobile was intoxicated, and where the instruction omitted the essential requirement that a person must know and appreciate a risk before he can assume it. Dempsey v. Knighton, 244 So. 2d 721, 1971 Miss. LEXIS 1338 (Miss. 1971).

In an action by an automobile passenger for personal injuries, an instruction that if the plaintiff voluntarily or knowingly placed himself in defendant's automobile when the defendant was intoxicated to the extent that it was an unsafe venture for the plaintiff, then the plaintiff assumed the risk embraced in the defendant's intoxicated condition was erroneous in failing to state that the plaintiff must know and understand the risk he is incurring and the plaintiff's choice to incur the risk must be free and voluntary. Griffin v. Holliday, 233 So. 2d 820, 1970 Miss. LEXIS 1684 (Miss. 1970).

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house when the contractor backed a truck into the laborer, an instruction that if the jury should find that the plaintiff laborer voluntarily and knowingly placed himself in a position of danger, then the plaintiff assumed the risk of injury and could not recover, was properly refused because the doctrine of assumption of the risk is not in force as between a master and servant. Smith v. Jones, 220 So. 2d 829, 1969 Miss. LEXIS 1479 (Miss. 1969).

An instruction in an action by one who slipped on a wet floor in a store entrance that plaintiff assumed such risks as were obvious to a person of ordinary intelligence, and that if plaintiff saw, knew and appreciated the danger, or should have done so by the exercise of reasonable care, the finding should be for the defendant, is erroneous as eliminating the distinction between assumption of risk and contributory negligence and as denying the jury's right to weigh the respective negligence, if any, of the parties. Wallace v. J. C. Penney Co., 236 Miss. 367, 109 So. 2d 876, 1959 Miss. LEXIS 328 (Miss. 1959).

In employee's suit against employer for personal injuries where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instruction eliminating entirely the question of whether the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action was error. Oakes v. Mohon, 208 Miss. 478, 44 So. 2d 551, 1950 Miss. LEXIS 266 (Miss. 1950).

26. —Sudden emergency.

Evidence that the decedent, after weaving back and forth over the centerline while proceeding southward, got into the northbound lane, and that the defendant, going northward, attempted to go into the southbound lane to avoid a collision but the decedent drove head on into the front of the defendant's vehicle, indicated that the defendant was confronted with a sudden emergency not of his making in which he was called on to take quick action in a hazardous situation, and justified the giving of the sudden emergency instruction as to the reduced standard of care required of a motorist in such a situation. Graves v. Hart's Bakery, Inc., 241 So. 2d 673, 1970 Miss. LEXIS 1360 (Miss. 1970).

In an action for injuries sustained in a three vehicle collision, it was error to instruct the jury on the sudden emergency doctrine with respect to the defendant motorist, where it was shown that just before striking the plaintiff's vehicle, the defendant had been following behind at a distance of only 36 feet while traveling 45 miles per hour in violation of Code 1942, § 8188. Dailey v. Acme Finance Corp., 234 So. 2d 902, 1970 Miss. LEXIS 1423 (Miss. 1970).

In an action for injuries sustained in a three vehicle collision, the giving of an instruction on the sudden emergency doctrine when it was shown that the motorist with respect to whom the instruction was given had, prior to striking the vehicle from the rear, observed the brakelights of vehicles ahead but continued to proceed at 50 miles per hour as he entered the westbound lane to pass, and had applied his brakes only when the vehicle ahead of him bounced across the center line after striking the vehicle in front of it, and thus had a substantial role in creating the circumstances which he maintained constituted an emergency. Dailey v. Acme Finance Corp., 234 So. 2d 902, 1970 Miss. LEXIS 1423 (Miss. 1970).

In a suit for the death of a child who had run into the street from behind a parked truck and had been struck by the defendant's automobile, the jury was properly instructed that a person confronted with a sudden emergency not of his own making is held only to the degree of care of a reasonable and prudent man in such emergency. Young v. Schwarz, 230 So. 2d 583, 1970 Miss. LEXIS 1560 (Miss. 1970).

An instruction as to the liability of a motorist to a pedestrian who unexpectedly walks in front of his car is not proper in a case in which the pedestrian had almost completed the crossing of a three-lane highway and was within 3 feet of the curb. Williams v. Moses, 234 Miss. 453, 106 So. 2d 45, 1958 Miss. LEXIS 517 (Miss. 1958).

In an action against the driver by a share-the-expense guest for injuries allegedly sustained when the automobile's foot brake failed to function properly resulting in the driver's automobile colliding into the rear of another automobile that had come to a stop, a sudden emergency instruction was erroneous which omitted any reference to the defendant's duty after the emergency arose to exercise such care as a reasonably prudent and capable driver would use under the unusual circumstances. Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333, 1958 Miss. LEXIS 396 (Miss. 1958).

27. —Damages; amount of recovery.

An instruction on present net cash value of lost earnings is appropriate where there is evidence to support it. If the defendant wishes the jury instructed on such matters, it is incumbent upon him or her to specifically request it, either by an instruction on his or her own, or by being added to one of the plaintiff's instructions. In the absence of specifically calling the matter to the attention of the circuit judge and tendering a requested instruction embracing this issue, any error is waived. Young v. Robinson, 538 So. 2d 781, 1989 Miss. LEXIS 103 (Miss. 1989).

A trial court in a personal injury action committed reversible error in refusing a requested jury instruction stating that an award for damages would not be subject to any income taxes and such taxes should not be considered in fixing the amount of the award. Seaboard S. R., Inc. v. Cantrell, 520 So. 2d 479, 1987 Miss. LEXIS 2981 (Miss. 1987).

Instructions in personal injury action which not only authorized the jury to take into consideration the decreased purchasing power of the dollar, but also to consider the increased costs of living, were calculated to encourage the jury to increase the damages based on matters aliunde of the record. Atwood v. Lever, 274 So. 2d 146, 1973 Miss. LEXIS 1595 (Miss. 1973).

In an action on a policy to recover for the death of a horse, a judgment in the plaintiff's favor would be reversed as to amount of liability, where by its terms the policy was to cover the actual cash value of the horse, not to exceed $4,000, and the evidence was conflicting as to the actual value, but the jury was instructed that if it should find for the plaintiff it should assess damages in the amount of $3,000 and the jury did return a verdict in that amount. St. Louis Fire & Marine Ins. Co. v. Lewis, 230 So. 2d 580, 1970 Miss. LEXIS 1559 (Miss. 1970).

In a suit for recovery under a wind and rainstorm policy, an instruction that if the insureds' roof was damaged by wind so that rain entered the house, it was insureds' duty to mitigate damages by using reasonable diligence to have the damages remedied, was erroneously refused in view of evidence that after the roof was damaged the insureds allowed the roof to remain damaged for two years, thereby allowing additional damages to the exterior and the interior of the house. White v. Pascagoula Civil Service Com., 222 So. 2d 131, 1969 Miss. LEXIS 1517 (Miss. 1969).

In a suit for damages for personal injuries, an instruction to the effect that the plaintiff could not prevail unless he proved by the preponderance of evidence that he sustained all of the injuries described in his declaration and that such injuries produced all of the claimed results, was erroneous and could, together with pictures taken during a surveillance of the plaintiff two weeks before trial, mislead the jury, where the case was tried nearly 18 months after the accident. Price v. Hearin-Miller Transporters, Inc., 220 So. 2d 813, 1969 Miss. LEXIS 1468 (Miss. 1969).

An instruction for the plaintiff, the condemnor of a right of way for a utility easement, that the public use to which the lands of the defendant are to be put is that of a right-of-way easement over and across the land and is not a fee simple taking, and that in arriving at the verdict as to the amount of damages the jury should take into consideration the fact that the taking is for a limited purpose, leaving the defendant right to use the land in a manner not inconsistent with the easement, was properly refused for the reason that it would have singled out a factor tending to reduce damages. Mississippi Power Co. v. Head, 218 So. 2d 24, 1968 Miss. LEXIS 1264 (Miss. 1968).

In an action for damages resulting to plaintiffs' property, allegedly resulting from a fill placed by a railroad company upon its land and the edge of plaintiffs' lot, which caused the discharge upon plaintiffs' tract of excess surface waters, the sole instruction on damages which told the jury that plaintiffs were not required to prove their damages with mathematical exactness, but that it could take into consideration all the evidence touching the extent, kind and character of the injuries and damages sustained, if any, by the plaintiffs, and from such evidence fix the amount of the damages, if any, failed to furnish the jury with any guide pertaining to the well-established rule of measurement of damages in surface water cases, and was erroneous. Alabama G. S. R. Co. v. Broach, 238 Miss. 618, 119 So. 2d 923, 1960 Miss. LEXIS 446 (Miss. 1960).

An instruction in a trespass action that plaintiff, if successful should be compensated for damage to his fences, for harassment and inconvenience and necessary labor to rebuild fences, and his trips and expenses to see defendant regarding such trespasses, and such monetary value as will compensate him for the inconvenience and labor caused by the trespasses, is objectionable as pyramiding damages and permitting punitive damages without proper qualification. Day v. Hamilton, 237 Miss. 472, 115 So. 2d 300, 1959 Miss. LEXIS 493 (Miss. 1959).

Instructing jury in death action that they may consider the present net cash value of deceased's life at the time of death is not error. Ashcraft v. Alford, 236 Miss. 25, 109 So. 2d 343, 1959 Miss. LEXIS 289 (Miss. 1959).

In a malpractice action, an instruction was approved which stated that if the jury found for plaintiff they should fix the amount of damages at such sum as would be fair and reasonable compensation for plaintiff's injuries proximately resulting from defendant's negligence, if any, and could give consideration to hospital bills, doctor bills, past, present and future pain and suffering, permanent disfigurement, humiliation and embarrassment, and impairment of earning capacity, if any, in each instance. Copeland v. Robertson, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that the Highway Commission could construct the interchange on its right of way without payment of damages to an abutting property owner was erroneous, where the construction included a high embankment near the owner's land, and the commission had revoked the owner's permit to enter the highway directly, so that his right of access to the highway was impaired. Carney v. Mississippi State Highway Com., 233 Miss. 598, 103 So. 2d 413, 1958 Miss. LEXIS 422 (Miss. 1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that abutting landowner was not entitled to damages resulting solely from inconvenience in entering and leaving his remaining property, provided that the public at large suffered the same inconvenience, was erroneous. Carney v. Mississippi State Highway Com., 233 Miss. 598, 103 So. 2d 413, 1958 Miss. LEXIS 422 (Miss. 1958).

In an action by a seller for the unpaid balance of a note given by the purchaser as part payment of a hay baler, purchaser's instructions authorizing the jury to deduct all damages suffered by the purchaser from the use of the machine, and which told the jury that if the purchaser was damaged in a sum equal to the balance alleged to be due under the contract, it should find for the defendant, was erroneous as failing to submit to the jury any proper measures of damages for a breach of warranty by the seller. Delta Motors, Inc. v. Childs, 233 Miss. 125, 101 So. 2d 527, 1958 Miss. LEXIS 364 (Miss. 1958).

In an action by a seller for the unpaid balance on a note given by the purchaser as part payment for a hay baler, wherein the purchaser defended upon the ground of a breach of warranty on the part of the seller, an instruction that told the jury to find for the purchaser unless it believed that the purchaser was indebted to the seller in the amount sued for was misleading, since the evidence as to the breach of warranty could have justified a finding for a less amount. Delta Motors, Inc. v. Childs, 233 Miss. 125, 101 So. 2d 527, 1958 Miss. LEXIS 364 (Miss. 1958).

An instruction authorizing the recovery of both attorney's fees and damages for lost time and inconvenience if the plaintiff was entitled to possession of the tractor, regardless of whether there was any fraud, malice, oppression or wilful wrong, was clearly erroneous in a replevin action. Ainsworth v. Blakeney, 232 Miss. 297, 98 So. 2d 880, 1957 Miss. LEXIS 476 (Miss. 1957).

In an action by an administratrix to recover for the wrongful death of her eight-year-old decedent, who was killed when struck by a truck, the trial court's instruction that if the jury should find for the plaintiff, they might consider as a proper element of damages the present net cash value of the life of deceased, if any, at the time of her death, was approved. Reed v. Eubanks, 232 Miss. 27, 98 So. 2d 132, 1957 Miss. LEXIS 441 (Miss. 1957).

An instruction for plaintiff in an action for damages for property and personal injuries sustained in a motor vehicle accident, detailing the elements of damages the jury might consider if it found for plaintiff and which then recited "but not to exceed the amount sued for by plaintiff," was not erroneous where no question was raised as to the amount of the verdict. Commercial Credit Corp. v. Smith, 231 Miss. 574, 96 So. 2d 911, 1957 Miss. LEXIS 539 (Miss. 1957).

In an appeal from the award of damages by a special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court correctly instructed for the county that the jury in arriving at its verdict should not consider any elements of inconvenience or other elements which were speculative and remote. Rasberry v. Calhoun County, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

In a stockowner's replevin action wherein defendant counterclaimed for damages caused by trespassing, an instruction which might have misled the jury to believe that they were authorized to assess the plaintiff with the value of his own cattle in addition to, and as a part of, the allowance to defendant of damages, was error. Galloway v. Brown, 230 Miss. 471, 93 So. 2d 459, 1957 Miss. LEXIS 390 (Miss. 1957).

In a stockowner's replevin action wherein the landowner cross-claimed for damages caused by trespassing, court's instruction that the jury might find for the defendants and award them actual damages for injuries to crops, fences and lands, and if it believed that former trespasses, known to the plaintiff, had occurred, the amount of actual damages awarded should be double, was error where plaintiff's 23 head of cattle had entered and grazed upon a portion of an oat field which was planted for and used only as a pasture for cattle belonging to defendant and others, since, under the circumstances, double damages was not allowable under Code 1942, § 4871. Galloway v. Brown, 230 Miss. 471, 93 So. 2d 459, 1957 Miss. LEXIS 390 (Miss. 1957).

In an action brought under Code 1942, § 6336-20, on behalf of 15-year-old school girl passenger injured in a collision between two school buses, owned and operated by the defendant, the trial court did not err in instructing that the jury might consider as an element of damage the disfigurement of the plaintiff, if any, caused by her injuries. Rankin County v. Wallace, 230 Miss. 413, 92 So. 2d 661, 1957 Miss. LEXIS 384 (Miss. 1957).

In an action of bastardy, the court's instruction that the jury's verdict might read "We, the jury, find for the plaintiff and assess her damages at $________ for the support and maintenance of the child to this date, and the additional amount of $________ per ________ (month, quarter or annum) from this date until said child shall reach the age of 18 years," was not erroneous as to form. Thomas v. Cook, 229 Miss. 458, 91 So. 2d 275, 1956 Miss. LEXIS 627 (Miss. 1956).

Although every factor affecting a depreciated market value may be put in evidence, they should not be made subject of special comment in instructions because this results in a duplication of damages. Wheeler v. State Highway Com., 212 Miss. 606, 55 So. 2d 225, 1951 Miss. LEXIS 490 (Miss. 1951).

Instruction in employee's suit for injuries, indicating form of verdict and leaving amount blank for jury to fill in was not reversible error where amount awarded was less than that sued for. Johns-Manville Products Corp. v. McClure, 46 So. 2d 539 (Miss. 1950).

Instructions in employee's suit to recover damages for injuries to the effect that jury can assess damages in such amount as jury may believe from preponderance of evidence plaintiff may have sustained including pain and suffering, loss of earning power, and injury to his body, was proper. Johns-Manville Products Corp. v. McClure, 46 So. 2d 539 (Miss. 1950).

In death action instruction authorizing jury to consider on question of damages the value of services of deceased to her husband, and the value of her association, society, and companionship to her husband and children, was proper. Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436, 1950 Miss. LEXIS 380 (Miss. 1950).

In action for damages for injuries sustained in automobile collision, refusal of instruction limiting recovery for medical bills to $205.00, amount expended by plaintiff up to time of trial, is correct because instruction would have prohibited jury from taking into consideration any medical expenses which plaintiff might reasonably be expected to have to pay in future. Kouvarakis v. Hawver, 208 Miss. 697, 45 So. 2d 278, 1950 Miss. LEXIS 288 (Miss. 1950).

In instructions on amount of damages recoverable, the use of expression authorizing recovery not to exceed stated amount sued for endangers verdict and may result in its reversal. St. Louis S. F. R. Co. v. Dyson, 207 Miss. 639, 43 So. 2d 95, 1949 Miss. LEXIS 376 (Miss. 1949).

In action brought under Federal Employers' Liability Act, instruction for plaintiff employee authorizing recovery of damages not to exceed stated amount sued for does not require reversal when damages awarded are not excessive, in view of fact that Supreme Court of United States has refused to condemn similar instructions in federal courts. St. Louis S. F. R. Co. v. Dyson, 207 Miss. 639, 43 So. 2d 95, 1949 Miss. LEXIS 376 (Miss. 1949).

Instruction to jury to bring in verdict, once liability is found, "not in excess of Fifteen Thousand Dollars, as alleged in the declaration," should not be given in action for damages for battery in which conflict in testimony is sharp and there is no sufficient basis for so substantial an award for personal injury. Hawkins v. Stringer, 205 Miss. 121, 38 So. 2d 454, 1949 Miss. LEXIS 417 (Miss. 1949).

In action for damages for battery, it is error to refuse instruction for defendant which denies to plaintiff any right to recover for permanent injuries and impaired eyesight when there is no substantial evidence of such injuries. Hawkins v. Stringer, 205 Miss. 121, 38 So. 2d 454, 1949 Miss. LEXIS 417 (Miss. 1949).

Plaintiff could not complain of instruction limiting amount of recovery on loss of automobile to price fixed by the Office of Price Administration, where he asked for and obtained such instruction rather than one authorizing a verdict for the actual or replacement value of the automobile under all the evidence. St. Paul Fire & Marine Ins. Co. v. Staten, 200 Miss. 197, 26 So. 2d 538, 1946 Miss. LEXIS 283 (Miss. 1946).

In depositor's action against bank for damage to credit and reputation resulting from improper dishonoring of checks, where jury first returned verdict for plaintiff but assessed his damages at "nothing," court's oral statement to jury to "return to your room and find a verdict for something," held reversible error. Weaver v. Grenada Bank, 180 Miss. 876, 179 So. 564, 1938 Miss. LEXIS 47 (Miss. 1938).

In action for death of school bus passenger in crossing collision, where jury returned two separate verdicts, one against railroad for $8,500 and other against bus driver for $1,000, returning verdicts to jury for further consideration, with directions that one verdict for entire sum be rendered, held proper. Mississippi C. R. Co. v. Roberts, 173 Miss. 487, 160 So. 604, 1935 Miss. LEXIS 204 (Miss. 1935).

It is erroneous to instruct the jury that it may find in any amount not exceeding the amount sued for, where the amount sued for is excessive damages. Gulfport & Mississippi Coast Traction Co. v. Keebler, 130 Miss. 631, 94 So. 795, 1922 Miss. LEXIS 236 (Miss. 1922).

28. —Punitive damages.

While punitive damages are not always appropriate whenever an insurance policy contains a provision that is invalid under state law, an insurer is not entitled to a peremptory instruction on liability to the effect that the insurer can never be liable when it acts in accordance with the provisions of its policy, regardless of their invalidity. Independent Life & Accident Ins. Co. v. Peavy, 528 So. 2d 1112, 1988 Miss. LEXIS 253 (Miss. 1988).

In an action for false arrest and malicious prosecution, an instruction that the jury might determine malice from a preponderance of the evidence, from the defendant's conduct and declaration, and from the zeal and activity of the defendant in pushing the prosecution against the plaintiff, was a comment on the testimony and so confusing that the jury might easily reach the conclusion that it was a peremptory instruction to find punitive damages. Allen v. Ritter, 235 So. 2d 253, 1970 Miss. LEXIS 1436 (Miss. 1970).

In a suit for damages arising out of the sale of an automobile, instructions requested by the plaintiff relating to punitive or exemplary damages were properly refused by the trial judge where the instructions required that the plaintiff prove only by a preponderance of the evidence that fraud was perpetrated upon her, since where fraud is charged it must be shown by evidence which is clear and more convincing than a mere preponderance. Brewster v. Bubba Oustalet, Inc., 231 So. 2d 189, 1970 Miss. LEXIS 1577 (Miss. 1970).

Punitive damages are ordinarily recoverable only in cases where the negligence is so gross as to indicate reckless or wanton disregard of the safety of others, and where the evidence does not disclose such a degree of negligence on the part of the defendant the trial court should instruct the jury that no punitive damages could be awarded. Ulmer v. Bunner, 190 So. 2d 448, 1966 Miss. LEXIS 1389 (Miss. 1966).

In a personal injury damage suit growing out of an accident caused by the backing of a truck over the body of a 33-month-old girl, since the negligence on the part of the defendant driver was not so reckless as to evince disregard for the rights of others or so gross as to be equivalent to a wilful wrong, defendants were entitled to an instruction that they were not liable for punitive damages, even though the plaintiffs sought no instructions for punitive damages, the declaration having submitted to the jury the plaintiffs' demand for punitive damages. Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226, 1962 Miss. LEXIS 432 (Miss. 1962).

In an action against a municipal policeman and the surety upon his official bond for wrongful assault upon the plaintiff by the policeman, an instruction that if the jury believed that the policeman acted wilfully in striking plaintiff it could assess punitive damages by way of punishment to the defendants was error as to the surety company, since in absence of a statute sureties on official bonds are not liable for punitive or exemplary damages. Vanderslice v. Shoemake, 233 Miss. 523, 102 So. 2d 804, 1958 Miss. LEXIS 411 (Miss. 1958).

Where it appeared that the defendant, while driving at a speed in excess of the city speed limit, either ignored or failed to see a stop sign, and without any effort to stop or check her speed ran into the intersection, striking plaintiff's pickup truck broadside, which defendant failed to see although it was daylight and there was nothing to obscure her vision, plaintiff was entitled to an instruction on punitive damages. Dame v. Estes, 233 Miss. 315, 101 So. 2d 644, 1958 Miss. LEXIS 382 (Miss. 1958).

In an action for damages for an alleged wrongful trespass committed by defendant in repossessing an automobile, where there was no substantial evidence to show that the defendant's agent used trickery or chicanery, or made false representations to obtain possession of the automobile, the trial court did not err in refusing to submit to the jury the question of punitive damages. Bradley v. Associates Discount Corp., 230 Miss. 131, 92 So. 2d 468, 1957 Miss. LEXIS 352 (Miss. 1957).

A court should not instruct a jury that it is its duty to assess punitive damages. Southeastern Express Co. v. Thompson, 139 Miss. 344, 104 So. 80, 1925 Miss. LEXIS 135 (Miss. 1925).

Nor can a court compel the assessment of punitive damages. Austin Machinery Corp. v. Clark-Hunt Contracting Co., 140 Miss. 78, 103 So. 1, 1925 Miss. LEXIS 236 (Miss. 1925).

29. —Instructions on statute.

A plaintiff motorist was entitled to an instruction that a preceding motorist was negligent as a matter of law under § 63-3-707, which provides that a driver should not turn a vehicle from a highway unless the turn can be made with reasonable safety, where the preceding driver admitted that he turned his vehicle to the left out of his lane of traffic without first looking to see whether the plaintiff was following him, and the court's refusal to give this requested instruction was reversible error. Conner v. Harris, 624 So. 2d 482, 1993 Miss. LEXIS 304 (Miss. 1993).

A party is not entitled to an instruction that one should yield to the car first entering an intersection where the statute requires stopping before entering the intersection in response to a red signal light, and Code 1942, § 8195 merely prescribes the general rule as to an ordinary intersection and is inapplicable to one with traffic lights and signals. Gates v. Green,

214 So. 2d 828, 1968 Miss. LEXIS 1337 (Miss. 1968).

In an action brought by a house mover against an electric company for injuries he received from coming into contact with a live power line, an instruction for defendant that if jury believed the power line in question had been erected and maintained in conformity with Code 1942, § 2778 and National Electric Safety Code there would be no liability on defendant, was erroneous and misleading for the moving of a house along a highway is not "common use of the highway," and instruction was also contrary to rule that whether utility is negligent despite compliance with National Electric Safety Code was a question for jury. Crouch v. Mississippi Power & Light Co., 193 So. 2d 144, 1966 Miss. LEXIS 1283, 1967 Miss. LEXIS 1546 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. Whitten v. Land, 188 So. 2d 246, 1966 Miss. LEXIS 1375 (Miss. 1966).

In an action by a railroad company for damages caused to its train when it was struck by a truck at a rural crossing for which there was no legally imposed speed limit, it was error to grant an instruction for the defendant that if the jury believed from the evidence that at the time and place in question the train was being run at an unlawful rate of speed under the conditions then prevailing, the railroad was guilty of negligence. Illinois C. R. Co. v. Aldy, 185 So. 2d 680, 1966 Miss. LEXIS 1532 (Miss. 1966).

An instruction based on the failure-to-stop-at-an-intersection -statute (Code 1942, § 8197) was properly refused when it was not worded in accordance with the requirements of the statute. Bush Constr. Co. v. Walters, 254 Miss. 266, 179 So. 2d 188, 1965 Miss. LEXIS 946 (Miss. 1965).

In action involving motor vehicle collision, instructions that if the demands of the parties were valid and equal, the verdict should be for defendant, that if plaintiff did not have a valid claim against a counter-claimant, and if the counter-claimant had a valid claim against plaintiff, then the verdict should be for the counter-claimant for his compensatory damages, and that if both parties had valid claims, but the claim of the counter-claimant exceeded that of the plaintiff, then the verdict should be for the counter-claimant for the excess over the plaintiff's claim, constituted substantial compliance with Code 1942, § 1483.5. Johnson v. Richardson, 234 Miss. 849, 108 So. 2d 194, 1959 Miss. LEXIS 559 (Miss. 1959).

In an action for personal injuries and property damages resulting when plaintiff's automobile ran into defendant's truck which was going in the same direction on a U. S. highway, where it appeared that the speed of defendant's truck at the time of the accident was from 10 to 20 miles per hour, the trial court committed reversible error in failing to charge that if the defendant was driving his vehicle on a federal designated highway at the time and place of the accident at a speed of less than 30 miles per hour where no fact existed justifying such slow speed under Code 1942, § 8178, and the reduced speed was the proximate, or a contributory cause of the accident, the jury should find for the plaintiff. Netterville v. Crawford, 233 Miss. 562, 103 So. 2d 1, 1958 Miss. LEXIS 418 (Miss. 1958).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, court properly instructed that the truck driver was guilty of negligence, and that plaintiff could recover on account thereof, if such negligence was a proximate, contributing cause of the collision. City of Jackson v. Reed, 233 Miss. 304, 103 So. 2d 6, 1958 Miss. LEXIS 380 (Miss. 1958), overruled, City of Jackson v. Williamson, 740 So. 2d 818, 1999 Miss. LEXIS 89 (Miss. 1999).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, the court properly instructed that the truck driver was guilty of negligence, and plaintiff could recover on account thereof, if the negligence was a proximate, contributing cause of the collision. City of Jackson v. Reed, 233 Miss. 304, 103 So. 2d 6, 1958 Miss. LEXIS 380 (Miss. 1958), overruled, City of Jackson v. Williamson, 740 So. 2d 818, 1999 Miss. LEXIS 89 (Miss. 1999).

Where a motorist had approached an intersection with the signal light flashing red in her direction, and failed to stop before entering therein, she was not entitled to an instruction under Code 1942, § 8195, providing that the driver of a vehicle approaching an intersection shall yield the right of way to vehicle which has entered the intersection from a different highway. Bates v. Walker, 232 Miss. 804, 100 So. 2d 611, 1958 Miss. LEXIS 333 (Miss. 1958).

There being no statute imposing a duty upon the driver of an overtaking vehicle the absolute duty of sounding an audible signal before passing without regard to whether the sounding of the signal is reasonably necessary to insure safe operation, an instruction that such was the law constituted reversible error where the proof was uncontradicted that the driver of the overtaking vehicle in which plaintiff was riding, did not sound his horn before attempting to pass defendant's vehicle, since it in effect peremptorily instructed the jury that the driver of the overtaking vehicle was guilty of negligence. Clark v. Mask, 232 Miss. 65, 98 So. 2d 467, 1957 Miss. LEXIS 445 (Miss. 1957).

An instruction that if the driver of the car in which plaintiff was riding negligently attempted to pass defendant's vehicle within 100 feet of an intersection, and such negligence was the sole proximate cause of the accident, the jury could find for the defendant, was correct, where the defendant showed that the attempt to pass was made within 50 or 60 feet of an intersection, which was one coming within the contemplation of the statute. Clark v. Mask, 232 Miss. 65, 98 So. 2d 467, 1957 Miss. LEXIS 445 (Miss. 1957).

Since no question of negligence is involved in the failure to comply with Code 1942, § 8163, the trial court properly refused to instruct that the fact that the defendant left the scene of a motor vehicle accident was a strong presumption that he was guilty of negligence by failing to stay at the scene of the accident and rendering first aid to the injured plaintiff and assisting in calling an ambulance and discharging other duties owed to the plaintiff. Clark v. Mask, 232 Miss. 65, 98 So. 2d 467, 1957 Miss. LEXIS 445 (Miss. 1957).

In an action arising out of intersection motor vehicle collision, the court's instruction that if the driver of a truck, which was not a "pick-up" truck, was violating the law in driving the truck at a speed of more than 45 miles per hour, such fact did not raise any presumptions of negligence on the part of the driver, was error in view of Code 1942, § 8176. Hill v. Columbus Ice Cream & Creamery Co., 230 Miss. 634, 93 So. 2d 634, 1957 Miss. LEXIS 404 (Miss. 1957).

In cross actions for damages and personal injuries arising out of a motor vehicle intersection collision, the trial court's instruction that defendant, who had been traveling along a road upon which a stop sign was located, not only had the duty to stop his automobile at the intersection but "to wait until he could safely proceed," was error, since that duty was not required by Code 1942, § 8197. Hill v. Columbus Ice Cream & Creamery Co., 230 Miss. 634, 93 So. 2d 634, 1957 Miss. LEXIS 404 (Miss. 1957).

In a wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year-old child upon a highway, the trial court did not err in instructing that the rider of a bicycle or other vehicle along a public highway should not turn from a direct course upon the highway unless and until such movement could be made with reasonable safety and then only after giving an appropriate signal, and the signal for a left turn should be given by extending the hand and arm horizontally. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

In a wrongful death action arising out of a defendant's automobile colliding with a bicycle ridden by a nine-year-old child upon the highway, the court erred in instructing that if the boy's failure to observe the requirements of the statute was the sole proximate cause of the accident, the jury could return a verdict for the defendant, since the jury might have been misled to conclude that, even though the defendant had seen the boy on the bicycle when he was several hundred feet in front of him, and failed to sound his horn, or apply his brakes until it was too late to avoid hitting the boy whose back was turned to the approaching automobile, they might disregard these facts and treat the unexpected and sudden action of the child in making a left turn on a bicycle as the sole proximate cause of the accident. Moak v. Black, 230 Miss. 337, 92 So. 2d 845, 1957 Miss. LEXIS 376 (Miss. 1957).

In action to recover damages for fire loss caused by defendant's train blocking street in municipality so as to prevent fire department from putting out fire, instructions to plaintiff that law prohibits railroad company from stopping train at places where it crosses street within the city limits for more than five minutes did not mislead jury, although such instruction left uncertain whether it based liability entirely on the state statute which has been held inapplicable to streets in municipalities, or on a combination of the statute and the city ordinances, since the case was tried on the theory of the negligence of defendant in violating the municipal ordinances. New Orleans & N. R. Co. v. Bryant, 209 Miss. 193, 46 So. 2d 433, 1950 Miss. LEXIS 379 (Miss. 1950).

An erroneous instruction on the prima facie statute as to running of a train. Yazoo & M. V. R. Co. v. Messina, 109 Miss. 143, 67 So. 963, 1915 Miss. LEXIS 127 (Miss. 1915), rev'd, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709, 1916 U.S. LEXIS 1461 (U.S. 1916).

30. —Miscellaneous.

An instruction using the phrase "a competent physician is not liable per se for a mere error of judgment" or "good faith error in judgment or honest error in judgment" should not be given in medical negligence cases because of their potential for confusing the jury; negligence that results in injury should support a finding of liability by a jury in a medical negligence case regardless of whether the act or omission giving rise to the injury was caused by an "honest error in judgment." Day v. Morrison, 657 So. 2d 808, 1995 Miss. LEXIS 331 (Miss. 1995).

An instruction to the jury regarding the standard of care required of a physician should refer to "that degree of care, skill, and diligence which would have been provided by a reasonably prudent, minimally competent physician" under similar circumstances; the term "reasonably prudent" speaks to the care and diligence that a professional must bring to a task, and the term "minimally competent" describes the degree of skill and knowledge a professional must bring to a task. McCarty v. Mladineo, 636 So. 2d 377, 1994 Miss. LEXIS 120 (Miss. 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding blood tests submitted into evidence constituted reversible error where the blood tests established a 99.99 percent probability that the defendant was the father, and the instruction stated that the blood tests were "not conclusive of the issue of paternity and merely establish that out of the black male population it is biologically possible for the defendant to be the father"; although the test results did not constitute conclusive evidence of paternity, it was error to instruct the jury that the tests meant that paternity was a biological "possibility" since this language tended to discredit the evidence in that it reduced the 99.99 percent probability to a mere possibility. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding the issue of whether the mother and the defendant had sexual intercourse during the period of probable conception constituted reversible error where the instruction stated that the jury would have to find that the couple had sexual intercourse without regard to the blood test results, which established a 99.99 percent probability that the defendant was the infant's father, or that the tests could not be a factor in the jury's conclusion on this question of fact; although such test results, standing alone, are insufficient to prove this element of a paternity claim, test results of this nature are relevant to whether sexual intercourse took place during the period of possible conception since they tend to make the existence of the fact that sexual intercourse took place during that time period more probable. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

The granting of an instruction in a will contest which advised the jury that it could not return a verdict for the proponent if it found that the testatrix was in any way influenced or guided or directed about or in or concerning the signing, publication, or the securing of attestation of the will by any person whomsoever, was reversible error, since it is undue influence that vitiates a will; a testator has the right to be directed and assisted in the preparation of his will and may have any aid or direction which he desires. Estate of Briscoe v. Briscoe, 255 So. 2d 313, 1971 Miss. LEXIS 1284 (Miss. 1971).

In a personal injury action, the court properly refused the defendant's requested instruction that if a certain physician actually saw, examined and treated the plaintiff during the period of his alleged injuries, then the plaintiff could have used the physician as a witness and therefore the jury would be justified in inferring that the physician's testimony would have been unfavorable to the plaintiff, where the physician was a resident of another state and the record was silent as to whether he was available for testimony. Great Atlantic & Pacific Tea Co. v. Scallon, 233 So. 2d 758, 1970 Miss. LEXIS 1663 (Miss. 1970).

In a personal injury suit against a city, where the plaintiff had waived the privilege of questioning an out-of-state doctor who had examined the plaintiff, and the city did not thereafter move for continuance or file interrogatories, the city's request for an instruction permitting the jury to draw unfavorable inferences from the plaintiff's failure to present the out-of-state doctor as a witness, was properly refused. City of Bay St. Louis v. Johnston, 222 So. 2d 841, 1969 Miss. LEXIS 1565, 1969 Miss. LEXIS 1566 (Miss. 1969).

In an action brought by a shopper who alleged that the manager of a store had unlawfully stopped her and searched her purse without cause, an instruction in which mere suspicion was made the basis of probable cause to believe that the plaintiff was attempting to commit the act of shoplifting, was in error. Butler v. W. E. Walker Stores, Inc., 222 So. 2d 128, 1969 Miss. LEXIS 1516 (Miss. 1969).

An instruction which tells the jury that the defendant must not only drive his automobile so as to be able to stop within the range of his vision, but that he must so drive his automobile that he can actually discover an object, perform manual acts necessary to stop, and bring his vehicle to a complete stop, if necessary to avoid collision with others on or near the highway, is such an instruction that would make the defendant the absolute insurer of the safety of the plaintiff, and consequently should not be granted. Mills v. Balius, 254 Miss. 353, 180 So. 2d 914, 1965 Miss. LEXIS 954 (Miss. 1965).

Instruction that it is a settled rule of law that insurance policies are always construed more strongly against the insurance company and more favorably for the insured should not have been given because it is not the function of the jury to construe the insurance contract. Canal Ins. Co. v. Howell, 253 Miss. 225, 175 So. 2d 517, 1965 Miss. LEXIS 984 (Miss. 1965).

Under a policy requiring that the insurance company be given due notice if the insured gin was not to operate during the regular season, the question as to what constituted due notice and whether it was given was for jury, and an instruction that notice to an insurance agency was notice to the insurance company, was too broad. Liverpool & London & Globe Ins. Co. v. Eagle Cotton Oil Co., 244 Miss. 110, 140 So. 2d 562, 1962 Miss. LEXIS 429 (Miss. 1962).

An instruction as to the form of the verdict to be rendered should the jury find for the plaintiff, and instructing them to write it on a separate piece of paper, was not erroneous in a malpractice action. Copeland v. Robertson, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

In an action for rent due on truck and trailer equipment pursuant to a rent contract between parties, instructions which referred to the contract as being exhibit A to the plaintiff's declaration, which was but a short and simple method of bringing to the jury's consideration the three page contract which was filed as an exhibition, was not erroneous. Smith v. Thompson, 233 Miss. 200, 101 So. 2d 530, 1958 Miss. LEXIS 371 (Miss. 1958).

An instruction properly submitted to the jury the question of whether a new agreement embodied in a formal contract, at defendants' request, which the plaintiff signed and mailed to the defendants for execution by them, and the defendants' actions after receipt of the signed copies of the new agreement, extinguished the earlier permission authorizing defendants to take possession of the property on a month to month basis, subject to termination at plaintiff's will. Spann v. Gulley, 233 Miss. 62, 101 So. 2d 337, 1958 Miss. LEXIS 358 (Miss. 1958).

In an appeal from an award of damages by special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court's instruction advising the jury that the purpose of the view was to enable it to have a more intelligent understanding of the land and the location of the proposed road was proper, where the jury was further advised to consider all the other evidence along with its observations. Rasberry v. Calhoun County, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

Instructions to jury in civil case which refer jury to declaration are erroneous for reason that frequently declaration is couched in technical and complicated language and jury should not be required to go to declaration in order to decipher facts from it. Jessup v. Reynolds, 208 Miss. 50, 43 So. 2d 753, 1949 Miss. LEXIS 407 (Miss. 1949).

Instruction in civil case which gives correct statement of necessary facts which jury must believe before awarding plaintiff verdict and which do not make it necessary for jury to sift declaration and carve out of it such facts as are essential to recovery is not erroneous on ground that it contains phrase, "as charged in the declaration." Jessup v. Reynolds, 208 Miss. 50, 43 So. 2d 753, 1949 Miss. LEXIS 407 (Miss. 1949).

Instruction which announces correct principles of law is not ground for reversal merely because it is too long when jury is not misled or confused by it. Y. D. Lumber Co. v. Aycock, 41 So. 2d 35 (Miss. 1949).

In cases where a too close issue of fact is involved, instructions on burden of proof should go no further than to advise jury that proponent of will or plaintiff in other civil cases is required to establish issue by preponderance of evidence. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

Substantial accuracy is all that is required in an instruction. Neely v. Charleston, 204 Miss. 360, 37 So. 2d 495, 1948 Miss. LEXIS 374 (Miss. 1948).

Instruction that if certain physician treated plaintiff in action for personal injury, and that such physician was available as a witness in her behalf, presumption would arise that his testimony would be adverse to plaintiff if she failed to call him as a witness, was erroneous where plaintiff on examination waived her privilege at a time when the taking of testimony in the case had not reached the half-way mark and there was no showing that the doctor in question was not reasonably available and that his attendance could not have been procured without unreasonable delay or discomfiture to the court. Clary v. Breyer, 194 Miss. 612, 13 So. 2d 633, 1943 Miss. LEXIS 106 (Miss. 1943).

31. Objections and exceptions.

A claim of error in the refusal of proffered instructions is procedurally preserved by the mere tendering of the instructions, suggesting that they are correct, and asking the court to submit them to the jury. This in and of itself affords opposing counsel fair notice of the party's position and the courts an opportunity to pass upon the matter. When instructions are refused, there is no reason to require an objection to the refusal, unless a value is to be placed upon "redundancy and nonsense." Carmichael v. Agur Realty Co., 574 So. 2d 603, 1990 Miss. LEXIS 780 (Miss. 1990).

A defendant's objection to a general negligence instruction after judgment in a motion for judgment notwithstanding the verdict was barred where the defendant failed to object to the instruction before the case went to the jury. Mills v. Barnhill,

546 So. 2d 664, 1989 Miss. LEXIS 294 (Miss. 1989).

In action against town for damages to land caused by defective sewage tank, landowners held not precluded from challenging propriety of directed verdict for defendant, although instruction was not excepted to and no motion for new trial was made assigning as ground the giving of such instruction, in view of statute and court rule making such action unnecessary. Hodges v. Drew, 172 Miss. 668, 159 So. 298, 1935 Miss. LEXIS 112 (Miss. 1935).

An instruction marked "given" or "refused" by the court and filed by the clerk is a part of the record and does not need to be excepted to. Cox v. State, 141 Miss. 607, 107 So. 7, 1926 Miss. LEXIS 470 (Miss. 1926).

In a conflict between the parties in the Supreme Court as to correctness of a bill of exceptions, the court will view the instructions and other proof in determining its correctness. Sovereign Camp, W. O. W. v. Sloan, 136 Miss. 549, 101 So. 195, 1924 Miss. LEXIS 112 (Miss. 1924).

An instance of a hypercritical objection to instruction. Southern R. Co. v. Floyd, 99 Miss. 519, 55 So. 287, 1911 Miss. LEXIS 222 (Miss. 1911).

The Supreme Court will take no notice of requests for instructions unless exceptions have been duly taken to the action of the court below with respect to them. Barney v. Scherling, 40 Miss. 320, 1866 Miss. LEXIS 73 (Miss. 1866).

32. Review.

Supreme Court will reverse judgment on appeal because of errors of court below in erroneously granting some, and refusing other, instructions, which results in denial of fair trial to appellant because jury is not properly instructed on law of case. Wilburn v. Gordon, 209 Miss. 27, 45 So. 2d 844, 1950 Miss. LEXIS 359 (Miss. 1950).

Fact that instruction is technically inaccurate will not alone cause a reversal of judgment; but when case on appeal is examined as a completed trial, and substantial error has not been committed and a fair and just result has been reached, judgment will be affirmed, notwithstanding error in instruction. Neely v. Charleston, 204 Miss. 360, 37 So. 2d 495, 1948 Miss. LEXIS 374 (Miss. 1948).

An instruction marked "given" or "refused" by the court and filed by the clerk is a part of the record and does not need to be excepted to. Cox v. State, 141 Miss. 607, 107 So. 7, 1926 Miss. LEXIS 470 (Miss. 1926).

An erroneous direction of verdict in favor of one defendant in an action for death held to be cause for reversal as to codefendant as being equivalent to directed verdict against it. Gulf & S. I. R. Co. v. Carlson, 137 Miss. 613, 102 So. 168, 1924 Miss. LEXIS 210 (Miss. 1924).

Error in directing a verdict is reviewable on appeal though not assigned as a ground in motion for new trial. Hayes v. Slidell Liquor Co., 99 Miss. 583, 55 So. 356, 1911 Miss. LEXIS 228 (Miss. 1911).

An instruction correct as requested may be assigned as error on appeal because of erroneous modification thereof. Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 So. 505, 1906 Miss. LEXIS 195 (Miss. 1906); Coleman v. Yazoo & M. V. R. Co., 90 Miss. 629, 43 So. 473, 1907 Miss. LEXIS 70 (Miss. 1907).

Instructions merely marked "given" or "refused" are not a part of the record unless indorsed by the clerk or indorsed in a bill of exceptions. McBride v. Adams, 70 Miss. 716, 12 So. 699 (Miss. 1893).

Instructions marked "given" by the clerk but not signed by the clerk will not be considered on appeal in the absence of the instructions being made a part of the record by bill of exceptions. Hansford v. State, 11 So. 106 (Miss. 1891).

The Supreme Court will not notice requests for instructions unless exceptions be duly taken to the action of the court below on them. Barney v. Scherling, 40 Miss. 320, 1866 Miss. LEXIS 73 (Miss. 1866).

Instructions when marked "given" or "refused" by the clerk constitute a part of the record. Swann v. West, 41 Miss. 104, 1866 Miss. LEXIS 20 (Miss. 1866); Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582, 1920 Miss. LEXIS 484 (Miss. 1920).

RESEARCH REFERENCES

ALR.

Instruction mentioning or suggesting specific sum as damages in action for personal injury or death. 2 A.L.R.2d 454.

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus." 4 A.L.R.2d 1077.

Instructions, in will contest, defining natural objects of testator's bounty. 11 A.L.R.2d 731.

Indoctrination by court of persons summoned for jury service. 89 A.L.R.2d 197.

Verdict-urging instructions in civil case stressing desirability and importance of agreement. 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors. 41 A.L.R.3d 1154.

Propriety and prejudicial effect of sending written instructions with retiring jury in civil case. 91 A.L.R.3d 336.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 A.L.R.3d 382.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony-state cases. 23 A.L.R.4th 1089.

Construction and application of provision of Rule 51 of Federal Rules of Civil Procedure requiring party objecting to instructions or failure to give instruction to jury, to state "distinctly the matter to which he objects and the grounds for objections." 35 A.L.R. Fed. 727.

Am. Jur.

75A Am. Jur. 2d, Trial §§ 920 et seq.

9A Am. Jur. Pl & Pr Forms (Rev), Evidence, Form 24 (instructions to jury-acceptance of stipulated fact as true); Form 72.1 (definitions); Form 125.1 (effect of number of witnesses on weight of evidence).

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 101-269 (Instructions and admonitions to jury).

CJS.

88A and 88B C.J.S., Trial §§ 444-761.

§ 11-7-157. No special form of verdict required.

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

HISTORY: Codes, 1906, § 762; Hemingway's 1917, § 565; 1930, § 574; 1942, § 1518.

Cross References — Members of jurors to agree on verdict in civil case, see § 13-5-93.

Verdict on trial of two or more defendants in criminal case, see § 99-19-7.

Another section derived from same 1942 code section, see § 99-19-9.

Special verdicts and general verdicts, see Miss. R. Civ. P. 49.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Damages.
3. Surplusage.
4. Comparative negligence.
5. Illustrative cases.

1. In general.

The trial court did not err in allowing the interrogatory form of the verdict where the verdict form accurately set out the elements of the action. Pickering v. Industria Masina I Traktora, 740 So. 2d 836, 1999 Miss. LEXIS 175 (Miss. 1999).

Verdicts of guilty on three counts of aggravated assault were not rendered invalid by the use of "Agg Assult" and "Avd Assult" on the verdict forms, especially as the jury was polled and all jurors were unanimous in their verdicts of guilty. Coles v. State, 756 So. 2d 12, 1999 Miss. App. LEXIS 241 (Miss. Ct. App. 1999).

The court did not err by refusing to clarify the form of the verdict where the jury verdict awarded a lump sum of damages to each individual plaintiff, with the exception of a couple of joint awards, but did not apportion out the amount applicable to each type of damage awarded. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 1998 Miss. LEXIS 367 (Miss. 1998).

The basic test as to the sufficiency of a verdict as to form is whether or not it is an intelligent answer to the issues submitted and expressed so that the intent of the jury can be understood by the court. Henson Ford, Inc. v. Crews, 249 Miss. 45, 160 So. 2d 81, 1964 Miss. LEXIS 375 (Miss. 1964); Wilson v. State, 197 Miss. 17, 19 So. 2d 475, 1944 Miss. LEXIS 269 (Miss. 1944).

A verdict that "we the jury find the defendant not guilty," returned not in a criminal case but in a tort action, is not a ground for reversible error for, under this section [Code 1942, § 1518], no special form of verdict is required. Mizell v. Cauthen, 251 Miss. 418, 169 So. 2d 814, 1964 Miss. LEXIS 360 (Miss. 1964).

Only general verdicts are provided for in this state. Flournoy v. Brown, 200 Miss. 171, 26 So. 2d 351, 1946 Miss. LEXIS 279 (Miss. 1946).

After verdict, a jury may be polled, but not interrogated otherwise. Flournoy v. Brown, 200 Miss. 171, 26 So. 2d 351, 1946 Miss. LEXIS 279 (Miss. 1946).

2. Damages.

In an action to recover for personal injuries sustained in a motor vehicle collision, the trial court erred in finding from the verdict returned that the jury intended to find for defendants under the instructions it had received, where the jury had been instructed that if it found both parties negligent, it should reduce plaintiff's recovery in proportion to her negligence, and where the jury returned a verdict finding both parties negligent to a degree with no damages assessed; the trial court should have returned the jury to further deliberate on a proper verdict. Harrison v. Smith, 379 So. 2d 517, 1980 Miss. LEXIS 1812 (Miss. 1980).

The fact that the jury in considering the contributory negligence of plaintiffs' decedent and the negligence of defendants in an action arising from an automobile collision and determining that the negligence of the parties was equal does not per se establish the fact that the jury did not follow the law in determining damages, and such fact did not constitute reversible error. Necaise v. Blalock, 210 So. 2d 637, 1968 Miss. LEXIS 1499 (Miss. 1968).

Verdict that "We the jury find for the plaintiff, twelve men for the plaintiff, eleven men recommend $22,500," held sufficient in form. Henson Ford, Inc. v. Crews, 249 Miss. 45, 160 So. 2d 81, 1964 Miss. LEXIS 375 (Miss. 1964).

In an action by plaintiff against defendant for damages to its trucks sustained in an intersectional motor vehicle collision wherein defendant counterclaimed for damages to his automobile and personal injuries, jury's verdict reciting, "we, the jury, find both the plaintiff and defendant counter-plaintiff at fault, and assess no damages to either side" was sufficiently clear for the lower court to enter judgment thereon. Hill v. Columbus Ice Cream & Creamery Co., 230 Miss. 634, 93 So. 2d 634, 1957 Miss. LEXIS 404 (Miss. 1957).

3. Surplusage.

In an action in which the only issue was damages, the parties having stipulated as to liability, the jury's initial verdict was sufficient and it was error for the trial court to return the jury for further deliberations where the initial verdict assessed damages at $5,000, thus answering the only issue submitted, and, though the assessment of the amount was followed by recommendations as to how to disperse the funds, such latter recommendations were only surplusage. Powell v. Thigpen, 336 So. 2d 719, 1976 Miss. LEXIS 1513 (Miss. 1976).

The written statement of the jury on the verdict and on a separate piece of paper in an automobile collision death action that "we find the defendant 50 percent responsible for accident and death of Mrs. Lucille Bilbro, $92,500" was surplusage and not a part of the verdict. Necaise v. Blalock, 210 So. 2d 637, 1968 Miss. LEXIS 1499 (Miss. 1968).

Jury's attempt to apportion among joint tortfeasors amount of damages found by it may be disregarded as surplusage. Meridian City Lines v. Baker, 206 Miss. 58, 39 So. 2d 541, 1949 Miss. LEXIS 242 (Miss. 1949).

4. Comparative negligence.

A court is not required to provide a jury with an instruction regarding the format for a comparative negligence verdict. O'Neal v. Roche Biomedical Lab., Inc., 805 So. 2d 551, 2000 Miss. App. LEXIS 140 (Miss. Ct. App. 2000).

5. Illustrative cases.

Trial court properly denied an injured laborer's motion for a new trial or a judgment notwithstanding the verdict because the employer did not want an inspection of the scissor lift prior to the employee's fall, the employer was notified that the capacity decals were not in place, there was no error or imposition of strict liability in the jury instructions, and the verdict substantially complied with the requirements of law. Howell v. Equip., Inc., 170 So. 3d 592, 2014 Miss. App. LEXIS 696 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 383 (Miss. 2015).

Where decedent was killed in a one-car collision after a tire on his truck burst, his estate sued the manufacturer; the jury returned an interrogatory verdict showing that the jurors were divided on the defective-manufacture claim, but when polled all agreed that the condition of the tire was not the proximate cause of decedent's death. The trial court did not err in denying the estate's motion for a new trial; the jury substantially complied with the law in rendering the verdict, as required by Miss. Code Ann. § 11-7-157. Oliver v. Goodyear Tire & Rubber Co., 10 So. 3d 976, 2009 Miss. App. LEXIS 238 (Miss. Ct. App. 2009).

RESEARCH REFERENCES

Am. Jur.

75B Am. Jur. 2d, Trial §§ 1297 et seq.

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 321-336 (general verdict).

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 341-451 (special issues, verdicts, and interrogatories).

CJS.

89 C.J.S., Trial §§ 933 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Juries and Jury Verdicts – Rules 38, 48-51, and 59. 52 Miss. L. J. 163, March 1982.

§ 11-7-159. Verdict may be reformed at the bar if informal or defective.

If the verdict is informal or defective, the court may direct it to be reformed at the bar. Where there has been a manifest miscalculation of interest, the court may direct a computation thereof at the bar, and the verdict may, if the jury assent thereto, be reformed in accordance with such computation.

HISTORY: Codes, 1906, § 779; Hemingway's 1917, § 562; 1930, § 571; 1942, § 1515.

Cross References — Another section derived from same 1942 code section, see § 99-19-11.

JUDICIAL DECISIONS

1. In general.

Since § 11-7-159 does not require that a verdict be reformed at the bar, it is merely directory, and therefore, the trial court did not err in directing the jury to retire to the juryroom and reform its verdict. Monroe County Electric Power Asso. v. Pace, 461 So. 2d 739, 1984 Miss. LEXIS 2055 (Miss. 1984).

Code 1942, § 1670 does not require at least three days notice of amendment before the amendment is actually made, and there was no error in the trial court correcting the verdict of the jury without the required notice, particularly in view of the fact that this section [Code 1942, § 1515] provides that if the verdict is informal or defective the court may direct it to be reformed at the bar. Poynter v. Trotter, 250 Miss. 812, 168 So. 2d 635, 1964 Miss. LEXIS 506 (Miss. 1964).

Where a jury trying a defendant had announced in open court that it had arrived at a verdict, which was handed to the clerk and, as read, found the defendant guilty as charged, whereupon one of the jurors mistakenly advised the court that the verdict was incorrect, and the word "not" was inserted in the verdict, but before the jury had adjourned, the court, being advised that amended verdict was wrong, ordered the jury back to the jury room for further deliberations and defendant was again found guilty, the court did not err in overruling defendant's motion for a new trial where it was shown that defendant's rights were not prejudiced by the occurrence. Anderson v. State, 231 Miss. 352, 95 So. 2d 465, 1957 Miss. LEXIS 519 (Miss. 1957).

Action of circuit court in permitting jury to reassemble and put its verdict in proper form before they had left courtroom or sight and presence of court was proper under this section [Code 1942, § 1515], where verdict was first returned, "We, jury, find the defendant guilty-charge," and was corrected to read, "We, the jury, find the defendant guilty as charged," and was signed by each member of jury. Serio v. Brookhaven, 208 Miss. 620, 45 So. 2d 257, 1950 Miss. LEXIS 279 (Miss. 1950).

RESEARCH REFERENCES

ALR.

Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

Am. Jur.

75B Am. Jur. 2d, Trial §§ 1366 et seq.

CJS.

89 C.J.S., Trial §§ 1064–1082.

§ 11-7-161. If verdict not responsive, jury to deliberate further.

If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation.

HISTORY: Codes, 1906, § 780; Hemingway's 1917, § 563; 1930, § 572; 1942, § 1516.

Cross References — Lack of agreement on verdict of two or more defendants in criminal case, see § 99-19-7.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Reversal of verdict.

1. In general.

Where decedent was killed in a one-car collision after a tire on his truck burst, his estate sued the manufacturer; the jury returned an interrogatory verdict showing that jurors were divided on the defective-manufacture claim, but when polled all agreed that the condition of the tire was not the proximate cause of decedent's death. The jury substantially complied with the law in rendering the verdict; the trial court was not required to send the jury back for further deliberations pursuant to Miss. Code Ann. § 11-7-161. Oliver v. Goodyear Tire & Rubber Co., 10 So. 3d 976, 2009 Miss. App. LEXIS 238 (Miss. Ct. App. 2009).

Under Miss. Code Ann. § 11-7-161, the jury's verdict and apportionment of fault between the architectural firm and architect individually was ambiguous, and the circuit judge erred in not ordering the jury to return for deliberations in order to reform the verdict to determine the architect's individual liability. Lambert Cmty. Hous. Group, L.P. v. Wenzel, 987 So. 2d 468, 2008 Miss. App. LEXIS 383 (Miss. Ct. App. 2008).

When jury in negligence case involving 3 defendants returns verdict which finds for 2 of defendants but makes no mention of third defendant, court may accept verdict as to defendants specifically mentioned but must return jury to jury room to reform verdict as to question of liability of third defendant; failure to do so will result in mistrial as to that defendant despite plaintiff's failure to request instruction against that defendant, individually. Adams v. Green, 474 So. 2d 577, 1985 Miss. LEXIS 2196 (Miss. 1985).

In an action in which the only issue was damages, the parties having stipulated as to liability, the jury's initial verdict was sufficient and it was error for the trial court to return the jury for further deliberations where the initial verdict assessed damages at $5,000, thus answering the only issue submitted, and, though the assessment of the amount was followed by recommendations as to how to disperse the funds, such latter recommendations were only surplusage. Powell v. Thigpen, 336 So. 2d 719, 1976 Miss. LEXIS 1513 (Miss. 1976).

2. Reversal of verdict.

The Court of Appeals erred when it reversed the verdict in a motor vehicle personal injury action on the ground that the jury had failed to follow its instructions and that the verdict was vague and incomplete as to which plaintiff had recovered since it was evident that the jury's verdict was a joint verdict in favor of both plaintiffs, even though the verdict stated that the jury assess the "Plaintiffs" damages. Byars v. Moore Planting Co., 755 So. 2d 415, 2000 Miss. LEXIS 9 (Miss. 2000).

The plaintiffs in an automobile negligence action were entitled to reversal of the jury's verdict where (1) the plaintiffs sought damages both for injuries received in the accident by one plaintiff and for loss of consortium for the other plaintiff, (2) the court instructed the jury to either render separate verdicts for each plaintiff or for the defendant, (3) the jury rendered a single verdict for the plaintiffs, and (4) the trial judge failed to send the verdict back to the jury with instructions to follow his instructions. Byars v. Moore Planting Co., 1999 Miss. App. LEXIS 54 (Miss. Ct. App. Feb. 23, 1999), rev'd, 755 So. 2d 415, 2000 Miss. LEXIS 9 (Miss. 2000).

RESEARCH REFERENCES

ALR.

Correction, by trial court, of verdict which finds for party on his cause of action or counterclaim for money judgment, but which does not state amount of recovery, or is indefinite in this regard, or which affirmatively states that he is entitled to no amount. 49 A.L.R.2d 1328.

Am. Jur.

75B Am. Jur. 2d, Trial §§ 1309, 1311 et seq.

CJS.

89 C.J.S., Trial §§ 1029-1032.

§ 11-7-163. No error if verdict omits something.

If, on an issue concerning several things in one count, a verdict be found for only part of them, it shall not be error, but the plaintiff shall be barred of his title to the things omitted.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 1 (91); 1857, ch. 61. art. 184; 1871, § 625; 1880, § 1584; 1892, § 721; 1906, § 781; Hemingway's 1917, § 564; 1930, § 573; 1942, § 1517.

§ 11-7-165. Award of damages in civil action against person who steals, embezzles, extorts or converts certain property of vulnerable adult; "position of trust" defined.

(1) In a civil action where it is proven that a person took property having a value of Two Hundred Fifty Dollars ($250.00) or more belonging to a vulnerable adult by conversion, embezzlement, extortion, theft or fraud without the owner's consent, or obtained the owner's consent by intimidation, deception, undue influence or by misusing a position of trust or a confidential relationship with the owner, then whether the action is to recover the property or damages in lieu thereof, or both, damages shall be recoverable up to three (3) times the amount of the monetary damages or value of the property embezzled, converted or otherwise stolen, in addition to any other damages.

(2) For purposes of this section, "position of trust" shall include, but not be limited to, a person who:

(a) Is named the attorney-in-fact in a power of attorney, whether executed before or after the adult became vulnerable;

(b) Has assumed a duty to provide care to the vulnerable adult;

(c) Is in a fiduciary relationship with the vulnerable adult, including a de facto guardian or de facto conservator; or

(d) Is a joint tenant or tenant in common with the vulnerable adult.

(3) "Vulnerable adult" shall have the meaning defined in Section 43-47-5, Mississippi Code of 1972.

(4) Civil remedies provided under this section shall be supplemental and cumulative, and not exclusive of other remedies afforded under any other law. Damages awarded under this section are remedial and not punitive, and do not limit and are not limited by any criminal action or any other provision of law.

Any civil damages paid by the civil defendant shall reduce the amount such defendant, upon conviction, may be ordered to pay in restitution, and any restitution paid under a criminal penalty shall reduce any civil damages owed.

(5) The cause of action, the right to bring a cause of action, or the right to seek treble damages pursuant to this section shall not be limited or affected by the death of the owner.

HISTORY: Laws, 2007, ch. 550, § 1, eff from and after July 1, 2007.

Editor's Notes — A former § 11-7-165 [Codes, Hutchinson's 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 184; 1871, § 625; 1880, § 1584; 1892, § 720; 1906, § 778; Hemingway's 1917, § 561; 1930, § 570; 1942, § 1514; Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991] provided that if the verdict omitted a price or value, the court could at any time award a writ of inquiry to ascertain the price or value.

In (1), (2)(b), (c) and (d), and (3), and in the section catchline, there are references to "vulnerable adult." Laws of 2010, ch. 357, amended the name of the "Vulnerable Adults Act," codified at § 43-47-1 et seq., to be the "Vulnerable Persons Act."

JUDICIAL DECISIONS

1. Summary judgment.

Chancery court properly granted a mother summary judgment in her conversion action against her son's fiancée because she produced a fully supported summary judgment motion that included a doctor's affidavit stating that the son was in the impaired range and that he did not have the cognitive ability, reasoning, or mental capacity to realize he was transferring a large sum of money to the fiancée or the consequences of his actions. Anderson v. Wiggins, — So. 3d —, 2019 Miss. App. LEXIS 209 (Miss. Ct. App. May 14, 2019).

§ 11-7-167. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-167. [Codes, 1857, ch. 61, art. 181; 1871, § 622; 1880, § 1727; 1892, § 746; 1906, § 808; Hemingway's 1917, § 596; 1930, § 600; 1942, § 1544]

Editor's Notes — Former § 11-7-167 listed defects that would not stay or reverse a judgment after verdict.

§ 11-7-169. Judgment—remedial orders.

In all actions in which the right to real or personal estate is in controversy, the court or the judge thereof shall make an order for the protection of the property in controversy from waste or destruction, and to prevent the removal of personal property beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and may enforce such order by an attachment for contempt and other proper process; but in all such cases the court or judge may require a bond of the party applying for the order, in an adequate penalty, payable to the opposite party, with sufficient sureties, to be approved by the court or judge, conditioned to pay all such damages as may be suffered by reason of such order in case the principal obligor be cast in the suit.

HISTORY: Codes, 1857, ch. 61, art. 179; 1871, § 661; 1880, § 1729; 1892, § 748; 1906, § 810; Hemingway's 1917, § 598; 1930, § 602; 1942, § 1546.

Cross References — Power of all courts to punish contempt, see § 9-1-17.
Authority of all judges to grant remedial writs, see § 9-1-19.
Uniform enforcement of foreign judgments, see § 11-7-301 et seq.
Writ of sequestration, see § 11-29-1 et seq.
Attachments at law generally, see § 11-33-1 et seq.
Writ of garnishment generally, see § 11-35-1 et seq.
Temporary protective orders in quo warranto proceeding, see § 11-39-15.

§ 11-7-171. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 253; 1871, § 822; 1880, § 1730; 1892, § 749; 1906, § 811; Hemingway's 1917, § 599; 1930, § 603; 1942, § 1547; Laws, 1950, ch. 332]

Editor's Notes — Former § 11-7-171 specified when a judgment was final.

§ 11-7-173. Judgment on bonds.

In an action brought upon a bond for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of the bond, to be discharged by the payment of the principal and interest due and costs of suit, and execution shall issue accordingly. However, if before judgment the defendant shall bring into court the principal and interest due upon the bond, he shall be discharged, and in that case judgment shall be entered for the costs alone.

HISTORY: Codes, 1857, ch. 61, art. 254; 1871, § 824; 1880, § 1731; 1892, § 750; 1906, § 812; Hemingway's 1917, § 600; 1930, § 604; 1942, § 1548.

Cross References — Release of excess in judgment on bond, see § 11-1-21.
Uniform enforcement of foreign judgments, see § 11-7-301 et seq.

RESEARCH REFERENCES

Am. Jur.
12 Am. Jur. 2d, Bonds §§ 32- 33.

§ 11-7-175. Liability of ships and vessels for causing death or injury.

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem against the said ship or vessel, or in personam against the owners thereof, or those having control of her, and to recover damages in respect thereof, then, in every such case the ship or vessel, which, had not death ensued, would have been liable to an action for damages, or to a libel in rem, and her owners, or those responsible for her acts or defaults or negligence to a libel in personam, shall be liable for all damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

HISTORY: Codes, Hemingway's 1921 Supp, § 616a; 1930, § 621; 1942, § 1565; Laws, 1920, ch. 234.

Cross References — Actions for injuries producing death, see § 11-7-13.
Liability for violation of boating law, see § 59-21-157 et seq.
Criminal liability for death by overloading boat, see § 97-3-41.

JUDICIAL DECISIONS

1. In general.

The limitation period does not condition the right of action under the statute. Triplett v. United States, 213 F. Supp. 887, 1963 U.S. Dist. LEXIS 7940 (S.D. Miss. 1963).

Actions under the statute are, since the amendment of 1908, governed by the general statute of limitations. Triplett v. United States, 213 F. Supp. 887, 1963 U.S. Dist. LEXIS 7940 (S.D. Miss. 1963).

RESEARCH REFERENCES

ALR.

Liability for injury or damage by motorboat. 63 A.L.R.2d 343.

Liability of owner or operator of pleasure boat for injury or death of guest passenger. 35 A.L.R.4th 104.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory. 3 A.L.R.5th 1.

Federal view as to effect of conditions appearing on back or margin of passenger's ticket for ocean voyage. 5 A.L.R. Fed. 394.

Applicability of Jones Act (46 USCS § 688) to foreign seamen, foreign ships, or other foreign circumstances. 68 A.L.R. Fed. 360.

Am. Jur.

2 Am. Jur. 2d, Admiralty §§ 101- 105.

CJS.

2 C.J.S., Admiralty §§ 62, 64, 66, 77, 78.

§§ 11-7-177 and 11-7-179. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-177. [Codes, 1880, § 1732; 1892, § 751; 1906, § 813; Hemingway's 1917, § 601; 1930, § 605; 1942, § 1549]

§ 11-7-179. [Codes, 1880, § 1733; 1892, § 752; 1906, § 814; Hemingway's 1917, § 602; 1930, § 606; 1942, § 1550]

Editor's Notes — Former § 11-7-177 pertained to rendering judgment according to the rights of the parties.
Former § 11-7-179 authorized the rendering of as many verdicts and judgments as necessary to adjust the rights of the parties.

§ 11-7-181. Office confession of judgment; how made.

A person indebted to another in any sum of money within the jurisdiction of the circuit court, on any promise, agreement, or covenant, may sign an office confession of judgment in the clerk's office of the circuit court, in the manner following, to wit: The creditor shall file in the clerk's office a statement, under oath, substantially to the effect following, viz.:

"The State of Mississippi, ________ County.

In the circuit court of said county, ________ day of ________, A.D. ________.

________ states, on oath, that ________ is justly indebted to him for the amount of ________ dollars on an instrument of writing in the following words and figures, viz.: (here copy the same), and in case of indorsement say indorsed as follows: (here copy the indorsement), or on open account, of which a copy is hereto attached, which remains due and unpaid, and that said sum of money is not due or claimed under a fraudulent or usurious consideration.

(Signed) ____________________

"Sworn to and subscribed the ________ day of ________ A. D. ________ before me.

"____________________, Clerk."

And if the evidence of the debt be in writing, the same shall be filed with said statement; and if not in writing, then a copy of the open account shall be filed; and the party indebted shall sign, before the clerk, an acknowledgment written upon or annexed to such statement, to the effect following, to wit:

"I do hereby acknowledge myself indebted to the said ________ in the sum of ________ Dollars, which includes interest up to the first day of the next term of the said circuit court, and I give my consent for judgment to be rendered against me in favor of said ________, at the next term of said circuit court for said amount and all legal costs accruing thereon, with stay of execution (if any) until (as may be agreed upon).

"Taken and acknowledged the ________ day of ________, A.D. ________, before me.

"____________________, Clerk."

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 6 (1); 1857, ch. 61, art. 257; 1871, § 827; 1880, § 1734; 1892, § 753; 1906, § 815; Hemingway's 1917, § 603; 1930, § 607; 1942, § 1551.

Cross References — Judgment on confession releasing errors, see § 11-7-187.
Recovery of attorney's fees in suit on open account, see § 11-53-81.

JUDICIAL DECISIONS

1. In general.

A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary or clerk of a county court, upon application by the plaintiff who although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed and whereby the defendant, to obtain relief by striking or opening the judgment, must assert prima facie grounds for relief and must persuade the court to open the judgment, are not unconstitutional on their face as violative of due process; under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. Swarb v. Lennox, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138, 1972 U.S. LEXIS 87 (U.S. 1972).

The fact that a note on which judgment was confessed was not due when the judgment was rendered does not deprive the circuit court of jurisdiction. Black v. Pattison, 61 Miss. 599, 1884 Miss. LEXIS 137 (Miss. 1884).

RESEARCH REFERENCES

ALR.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment. 39 A.L.R.2d 1232.

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 180 et seq.

15 Am. Jur. Pl & Pr Forms, (Rev), Judgments, Forms 211-225 (judgments by confession).

CJS.

49 C.J.S., Judgments §§ 210, 211, 215–219, 222, 223.

173-175, 177, 178 et seq.

§ 11-7-183. Office confession of judgment; how made final.

When such statement and acknowledgment are filed, the clerk shall docket the cause on the appearance docket, and at the next term on the motion of the plaintiff, the court shall render judgment thereon for the amount acknowledged to be due, with interest from the first day of the term, and with such stay of execution, if any, as may be stipulated; and such judgment shall be final unless set aside during the term, and shall be as binding and obligatory as a judgment rendered in any other form; and a full and complete final record shall be made therein as in other cases.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 6 (1); 1857, ch. 61, art. 258; 1871, § 828; 1880, § 1735; 1892, § 754; 1906, § 816; Hemingway's 1917, § 604; 1930, § 608; 1942, § 1552.

Cross References — Duty of clerk to make final record of proceedings, see § 9-7-127.

JUDICIAL DECISIONS

1. In general.

A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary or clerk of a county court, upon application by the plaintiff who, although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed, and whereby the defendant, to obtain relief by striking or opening the judgment, must assert prima facie grounds for relief and must persuade the court to open the judgment, are not unconstitutional on their face as violative of due process; under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. Swarb v. Lennox, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138, 1972 U.S. LEXIS 87 (U.S. 1972).

The lien of such judgment only takes effect from confirmation. Bass v. Estill, 50

Miss. 300, 1874 Miss. LEXIS 58 (Miss. 1874).

RESEARCH REFERENCES

ALR.

Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised. 35 A.L.R.2d 1452.

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 180, 201-206.

CJS.

49 C.J.S., Judgments §§ 264–279.

§ 11-7-185. Office confession of judgment; void in certain cases.

A judgment rendered on office confession shall be void in toto as to third parties, if tainted with fraud or usury.

HISTORY: Codes, 1892, § 755; 1906, § 817; Hemingway's 1917, § 605; 1930, § 609; 1942, § 1553.

RESEARCH REFERENCES

Am. Jur.

46 Am. Jur. 2d, Judgments § 205.

CJS.

49 C.J.S., Judgments § 278.

§ 11-7-187. Judgment on confession as release of errors.

A judgment on confession shall be equal to a release of all errors; but all powers of attorney for confessing or suffering judgment to pass by default or otherwise, and all general releases of error made or to be made by any person before action brought, shall be absolutely null and void.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (94); 1857, ch. 61, art. 185; 1871, § 626; 1880, § 1728; 1892, § 747; 1906, § 809; Hemingway's 1917, § 597; 1930, § 601; 1942, § 1545.

Cross References — Execution docket in chancery court, see § 9-5-217.
Form of office confession of judgment, see § 11-7-181.
Power and letters of attorney, see § 87-3-1 et seq.

JUDICIAL DECISIONS

1. In general.

The statute will not prohibit an appeal from a confessed judgment rendered by a justice of the peace. James v. Woods, 65 Miss. 528, 5 So. 106, 1888 Miss. LEXIS 38 (Miss. 1888).

RESEARCH REFERENCES

ALR.

Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 A.L.R.2d 514.

Consent decree as affecting title to real estate in another state. 2 A.L.R.2d 1188.

Constitutionality, construction, application, and effect of statute invalidating powers of attorneys to confess judgment or contracts giving such power. 40 A.L.R.3d 1158.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 A.L.R.3d 1170.

CJS.

49 C.J.S., Judgments § 264.

§ 11-7-189. Enrollment of judgments; satisfaction.

(1) The clerk of the circuit court shall procure and keep in his office one or more books to be styled "The Judgment Roll," which book or books shall be appropriately divided under the several letters of the alphabet, and on each page shall be placed the following captions:

Defendant's Name and Name of Defendant's Attorney and Post Office Address of Each	Amount of Judgment or Decree	Date of Rendition	County and Court in Which Rendered	Social Security or Tax Identification Number

Date, Hour and Minute of Enrollment	Plaintiff's Name, Plaintiff's Attorney, and Post Office Address of Each		When and How Satisfied	Remarks

The clerk shall, within twenty (20) days after the adjournment of each term of court, enroll all final judgments rendered at that term in the order in which they were entered on the minutes by entering on The Judgment Roll, under the proper letter or letters of the alphabet, the name of each and every defendant to such judgment, the post office address of each defendant, and the social security or tax identification number of each defendant if such information is known or readily ascertainable, and if such defendant or defendants have an attorney at law in such case the name and post office address of such attorney or firm of attorneys if such post office address is known or readily ascertainable; the amount of such judgment; date of rendition; county and court in which rendered; the date, hour and minute of enrollment; and the name of the plaintiff or plaintiffs and the post office address of each plaintiff if readily ascertainable, and if represented by an attorney at law or a firm of attorneys then the name and post office address of such attorney or firm of attorneys if the post office address is known or readily ascertainable. The name of the attorney or firm of attorneys and post office addresses of the parties may be subsequently inserted by the clerk at any time.

Notwithstanding the foregoing, the failure to list a social security number on a judgment shall not invalidate said judgment nor shall it make the party failing to list said judgment liable for such failure to list or the recording official liable for such failure.

(2) Any attorney of record representing a plaintiff or plaintiffs in the case may, for and on behalf of his client or clients, satisfy in whole or in part a judgment on such Judgment Roll by endorsing thereon the extent of such satisfaction and signing an entry so showing, and when so satisfied the clerk shall attest and subscribe such endorsement under the proper heading therein. When any judgment shall otherwise be satisfied, the clerk shall so enter under proper heading and subscribe the entry.

(3) The Judgment Roll may be kept on computer as provided in Section 9-7-171. In such case the plaintiff or attorney representing such plaintiff shall present to the clerk a sworn affidavit directing the clerk to cancel or otherwise show as satisfied the judgment recorded under this section.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 16 (12); 1857, ch. 61, art. 260; 1871, § 829; 1880, § 1736; 1892, § 756; 1906, § 818; Hemingway's 1917, § 606; 1930, § 610; 1942, § 1554; Laws, 1946, ch. 437; Laws, 1960, ch. 233, §§ 1, 2; Laws, 1994, ch. 521, § 27; Laws, 1994, ch. 458, § 8; Laws, 1997, ch. 342, § 1, eff from and after July 1, 1997.

Cross References — Enrollment of money decrees from chancery court, see § 9-5-159.

Uniform enforcement of foreign judgments, see § 11-7-301 et seq.

Lis pendens record in chancery court, see § 11-47-1.

Enrollment of notice of lien for franchise taxes, see § 27-13-29 et seq.

Enrollment of notice of lien for sales taxes, see § 27-65-57.

Enrollment of warrant for collection of tobacco tax, see § 27-69-41.

Enrollment of warrant for collection of wine and beer tax, see § 27-71-333.

Enrollment of warrant for collection of contributions to employment security commission, see §§ 71-5-367, 71-5-369.

Satisfaction of judgment by surety, see § 87-5-9.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Date lien attaches.
3. Property subject to lien.
4. Priority.

1. In general.

Judgment debtor requested that a circuit court cancel a judgment, but the circuit court properly ruled that it lacked jurisdiction to do so, and moreover only the judgment creditor had the authority to remove the judgment from the county's rolls; the circuit court had merely entered an order that accepted a letter of credit instead of a supersedeas bond, and that order did not affect the underlying judgment. Fitch v. Valentine, 946 So. 2d 780, 2007 Miss. LEXIS 10 (Miss. 2007).

Judgment lien of United States obtained in proceeding in Federal district court is subject, under applicable Federal statutes, to state statutes (Code 1942, §§ 733, 735, 1554, 1555), governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. United States v. Williams-Richardson Co., 206 Miss. 378, 40 So. 2d 177, 1949 Miss. LEXIS 268 (Miss. 1949).

The enrollment of a judgment against two persons, partners, under the letter of the name of one only, does not bind the property of the other. Hughes v. Lacock, 63 Miss. 112, 1885 Miss. LEXIS 26 (Miss. 1885).

2. Date lien attaches.

Pursuant to Miss. Code Ann. § 11-7-189(1), a transfer of property occurred when a transferee's state court judgment against a debtor was enrolled in the county Judgment Roll, the date of which was well outside the 90-day period found in 11 U.S.C.S. § 547(b)(4)(A); thus, it was not preferential. Studdard v. Pitts (In re Studdard), 2007 Bankr. LEXIS 2693 (Bankr. S.D. Miss. Aug. 2, 2007).

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962), overruling Clark v. Duke, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962), overruling Clark v. Duke, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Judgment enrolled after time allowed clerk for enrolling judgment did not affect rights of bona fide purchaser for value purchasing property before enrollment but after judgment was rendered. Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 141 So. 903, 1932 Miss. LEXIS 73 (Miss. 1932).

Attorney's fees held not recoverable as damages for wrongful act in levying execution where judgment creditors and sheriff acted on advice of counsel, though erroneous, that under this section [Code 1942, § 1554] and Code 1942, § 1555, the lien of the judgment in question related back to the rendition of the judgment. Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 141 So. 903, 1932 Miss. LEXIS 73 (Miss. 1932).

3. Property subject to lien.

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962), overruling Clark v. Duke, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Enrollment and entry of judgment by judgment creditor on judgment roll of the county did not give the judgment creditor a lien on judgment debtor's cotton which judgment debtor sold and delivered to a third person, and the judgment creditor was not entitled to recover the value of the cotton from third person where no execution or other process was ever issued or levied on the cotton, despite the fact that the statute provides that enrolled judgment shall be a lien on all property of judgment debtor within the county. Willis Hardware Co. v. Clark, 216 Miss. 84, 61 So. 2d 441, 1952 Miss. LEXIS 619 (Miss. 1952).

A judgment enrolled in the county became a lien on all the property of the defendant subject to execution, notwithstanding an appeal with supersedeas was immediately taken after the rendition of the judgment and before it was enrolled. Williams & Freeman v. Bosworth, 102 Miss. 160, 59 So. 6, 1912 Miss. LEXIS 40 (Miss. 1912).

4. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962), overruling Clark v. Duke, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Expenses of last illness and funeral expenses constitute preference claim over enrolled judgment upon which execution has not been issued and levied. Dabney v. Continental Jewelry Co., 163 Miss. 1, 140 So. 338, 1932 Miss. LEXIS 9 (Miss. 1932).

RESEARCH REFERENCES

ALR.

Necessity of notice of application or intention to correct error in judgment entry. 14 A.L.R.2d 224.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

CJS.

49 C.J.S., Judgments §§ 179 et seq.

§ 11-7-191. Enrolled judgment as lien.

A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled. In counties having two (2) judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 14 (1); 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 757; 1906, § 819; Hemingway's 1917, § 607; 1930, § 611; 1942, § 1555; Laws, 1995, ch. 565, § 3, eff from and after July 1, 1995.

Cross References — Uniform enforcement of foreign judgments, see § 11-7-301 et seq.

Lien of enrolled judgment of justice court, see § 11-9-129.

Writ of execution in absence of judgment lien, see § 13-3-139.

Execution and garnishment on enrolled judgments and decrees, see § 13-3-155.

Duty of officer making execution sale to apply proceeds according to priority of liens, see § 13-3-181.

Limitation of actions on judgments, see § 15-1-1 et seq.

Preference of purchase-money mortgage, see § 89-1-45.

Provisions relative to judgments in the amount of overdue child support payments, see § 93-11-71.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. When lien attaches.
3. Property subject to lien.
4. —After-acquired property.
5. Persons affected; bona fide purchasers.
6. Priority.
7. Effect of appeal; affirmance of judgment.

1. In general.

Judgment debtor requested that a circuit court cancel a judgment, but the circuit court properly ruled that it lacked jurisdiction to do so, and moreover only the judgment creditor had the authority to remove the judgment from the county's rolls; the circuit court had merely entered an order that accepted a letter of credit instead of a supersedeas bond, and that order did not affect the underlying judgment. Fitch v. Valentine, 946 So. 2d 780, 2007 Miss. LEXIS 10 (Miss. 2007).

Where a chancery court found in favor of the purchaser of a warranty timber deed in a breach of contract action in which it was determined that the seller of the deed did not have legal title to the land, the chancery court erred in denying the purchaser a judgment lien on the property pursuant to Miss. Code Ann. § 11-7-191 and Miss. Code Ann. § 11-7-197 because the judgment constituted a lien on the property once the judgment was enrolled. Gordon v. Gordon, 929 So. 2d 981, 2006 Miss. App. LEXIS 395 (Miss. Ct. App. 2006).

Judgment lien of United States obtained in proceeding in Federal district court is subject, under applicable Federal statutes, to state statutes (Code 1942, §§ 733, 735, 1554, 1555), governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. United States v. Williams-Richardson Co., 206 Miss. 378, 40 So. 2d 177, 1949 Miss. LEXIS 268 (Miss. 1949).

The object of enrollment is to protect the rights of persons who should become purchasers. Josselyn v. Stone, 28 Miss. 753, 1855 Miss. LEXIS 21 (Miss. 1855).

The rights of the state are not affected by the enrollment laws. Josselyn v. Stone, 28 Miss. 753, 1855 Miss. LEXIS 21 (Miss. 1855).

2. When lien attaches.

Deeds and instruments made prior to lis pendens notice but not recorded until after notice has been given are made subject to the lis pendens notice, after an interest has been established by recorded judgment by operation of law. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640, 1964 Miss. LEXIS 393 (Miss. 1964).

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962), overruling Clark v. Duke, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Lien under alimony decree cannot arise, if at all, until default in payment of installments. Harris v. Worsham, 164 Miss. 74, 143 So. 851, 1932 Miss. LEXIS 224 (Miss. 1932).

Judgment lien relates back to date of rendition of judgment only when enrolled within time allowed to clerk for enrolling judgment. Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 141 So. 903, 1932 Miss. LEXIS 73 (Miss. 1932).

Under this [Code 1942, § 1555] and the preceding section [Code 1942, § 1554], a judgment does not become a lien unless enrolled within twenty days provided for, and after such twenty days it is not a lien unless enrolled; title passing from judgment debtor to third person for a consideration before an enrollment of judgment is not affected thereby. Johnson v. Cole Mfg. Co., 144 Miss. 482, 110 So. 428 (1926). See as an exception Perry Nugent & Co. v. Priebatsch, 61 Miss. 402, 1883 Miss. LEXIS 147 (Miss. 1883).

The only difference with regard to the lien of a judgment rendered by the circuit court and one rendered by a justice of the peace is that the first, upon enrollment, becomes a lien and binds the property of defendant from the rendition thereof, while the lien of the latter attaches only from the date of its enrollment. Minshew v. Geo. W. Davidson & Co., 86 Miss. 354, 38 So. 315, 1905 Miss. LEXIS 29 (Miss. 1905).

The lien can attach to money only from its seizure. Cahn v. Person, 56 Miss. 360, 1879 Miss. LEXIS 129 (Miss. 1879).

3. Property subject to lien.

Pursuant to Miss. Code Ann. § 11-7-191, an enrolled judgment does not become a lien on money or intangible property of the judgment defendant until such time as the judgment creditor seizes the money or intangible property by way of a writ of garnishment or other appropriate writ; where a creditor claimed that it enjoyed a secured position with respect to debtor's accounts receivable by virtue of a pre-petition judgment it obtained against debtor, it did not have a perfected lien on the accounts and accounts receivable because creditor had not seized or garnished any accounts or accounts receivable of debtor. In re Rexrode, 2005 Bankr. LEXIS 915 (Bankr. N.D. Miss. May 18, 2005).

Once a judgment is obtained and duly enrolled, the judgment becomes a lien on all property of the judgment debtor situated within the county; The lien follows the property and may be enforced against the property wherever it may be found within the county, without regard to intervening right of any third party. Merideth v. United States, 327 F. Supp. 429, 1970 U.S. Dist. LEXIS 9382 (N.D. Miss. 1970), aff'd, 449 F.2d 186, 1971 U.S. App. LEXIS 7783 (5th Cir. Miss. 1971).

Enrollment and entry of judgment by judgment creditor on judgment roll of the county did not give the judgment creditor a lien on judgment debtor's cotton which judgment debtor sold and delivered to a third person, and the judgment creditor was not entitled to recover the value of the cotton from third person where no execution or other process was ever issued or levied on the cotton, despite the fact that the statute provides that enrolled judgment shall be a lien on all property of judgment debtor within the county. Willis Hardware Co. v. Clark, 216 Miss. 84, 61 So. 2d 441, 1952 Miss. LEXIS 619 (Miss. 1952).

A judgment lien on land includes a lien on the timber thereon, before and after the timber is cut off. Stuart v. Pickett, 193 Miss. 455, 10 So. 2d 207, 1942 Miss. LEXIS 136 (Miss. 1942).

Where a husband and wife joined in a conveyance of the timber on his land, which was subject to a judgment lien against him, and, the land thereafter having been forfeited to the state for taxes, the husband, who was insolvent, induced the purchaser of the timber to advance him sufficient money out of the balance due him on the purchase price with which to purchase the state's title to the land, and thereupon paid the money to the state, receiving the state's deed in his wife's name, the title vested in the husband, and not in his wife, and so was subject to the judgment lien, and the judgment creditor was entitled to recover the unpaid balance of the timber contract. Stuart v. Pickett, 193 Miss. 455, 10 So. 2d 207, 1942 Miss. LEXIS 136 (Miss. 1942).

Decree allowing solicitor fee in partition cause was not subject to lien of judgment against solicitor. Bank of Monticello v. L. D. Powell Co., 159 Miss. 183, 130 So. 292, 1930 Miss. LEXIS 356 (Miss. 1930).

Under this [Code 1942, § 1555] and the preceding section [Code 1942, § 1554] a judgment does not become a lien unless enrolled within twenty days provided for, and after such twenty days it is not a lien unless enrolled; title passing from judgment debtor to third person for a consideration before an enrollment of judgment is not affected thereby. Johnson v. Cole Mfg. Co., 144 Miss. 482, 110 So. 428 (1926). See as an exception Perry Nugent & Co. v. Priebatsch, 61 Miss. 402, 1883 Miss. LEXIS 147 (Miss. 1883).

A voucher for the payment of money due is not subject to the lien of an enrolled judgment and its negotiability is unaffected thereby. R. F. Walden & Co. v. Yates, 111 Miss. 631, 71 So. 897, 1916 Miss. LEXIS 353 (Miss. 1916).

An enrolled judgment is not a lien upon a debt due judgment defendant. Bryan v. Henderson Supply Co., 107 Miss. 255, 65 So. 242, 1914 Miss. LEXIS 75 (Miss. 1914).

A judgment creditor has the same rights to property that a judgment debtor had, and no other. Candler v. Cromwell, 101 Miss. 161, 57 So. 554, 1911 Miss. LEXIS 116 (Miss. 1911).

A deed of trust or mortgage becomes a lien upon a growing crop, but a judgment does not attach to a growing crop. Candler v. Cromwell, 101 Miss. 161, 57 So. 554, 1911 Miss. LEXIS 116 (Miss. 1911).

A voluntary partition by agreement between tenants in common will not affect a judgment creditor of one of them. Simmons v. Gordon, 98 Miss. 316, 53 So. 623, 1910 Miss. LEXIS 64 (Miss. 1910).

The statute only relates to judgments against the defendant from whom the money has been collected; and applies only to money made by a sale under execution. Johnson v. Edde, 58 Miss. 664, 1881 Miss. LEXIS 21 (Miss. 1881).

A judgment-creditor takes in execution the property of his debtor subject to every liability under which the debtor himself held it at the time of the rendition of the judgment, and subject to all equities which exist at the time in favor of third persons, except where otherwise provided by statute. Walton v. Hargroves, 42 Miss. 18, 1868 Miss. LEXIS 31 (Miss. 1868); Foute v. Fairman, 48 Miss. 536, 1873 Miss. LEXIS 76 (Miss. 1873).

The lien extends to the money produced by sale under execution as well as to the property sold. Smith v. Everly, 5 Miss. 178, 1839 Miss. LEXIS 69 (Miss. 1839).

The removal of property out of the county after the lien has attached does not destroy it. Chilton v. Cox, 15 Miss. 791, 1846 Miss. LEXIS 204 (Miss. 1846).

4. —After-acquired property.

The judgment, if enrolled, becomes a lien on after-acquired property from the date of its acquisition. Jenkins v. Gowen, 37 Miss. 444, 1859 Miss. LEXIS 35 (Miss. 1859); Cayce v. Stovall, 50 Miss. 396, 1874 Miss. LEXIS 73 (Miss. 1874); Moody v. Doe, 25 Miss. 484, 1853 Miss. LEXIS 19 (Miss. 1853); Cooper v. Turnage, 52 Miss. 431, 1876 Miss. LEXIS 237 (Miss. 1876).

5. Persons affected; bona fide purchasers.

Under Mississippi law, a statutory lien on the property of a judgment debtor situated in the county of enrollment follows the property, but the lien statutes do not authorize a money judgment against one who disposes of the property. Merideth v. United States, 327 F. Supp. 429, 1970 U.S. Dist. LEXIS 9382 (N.D. Miss. 1970), aff'd, 449 F.2d 186, 1971 U.S. App. LEXIS 7783 (5th Cir. Miss. 1971).

Judgment enrolled after time allowed to clerk for enrolling judgment did not affect rights of bona fide purchaser for value purchasing property before enrollment but after judgment was rendered. Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 141 So. 903, 1932 Miss. LEXIS 73 (Miss. 1932).

Judgment creditor held not to have released lien on automobile by authorizing release of first levy of execution. Purchaser of automobile from judgment creditor held charged with knowledge of statutory lien of judgment creditor. Gerlach-Barklow Co. v. Ellett, 145 Miss. 60, 111 So. 92, 1927 Miss. LEXIS 133 (Miss. 1927).

Where a judgment was rendered and enrolled by mistake against a wrong party, it cannot be corrected thereafter between the right parties so as to affect the rights of bona fide purchasers intervening. Allen West Com. Co. v. Millstead, 92 Miss. 837, 46 So. 256, 1908 Miss. LEXIS 231 (Miss. 1908); Stone v. Threefoot Bros. & Co., 99 Miss. 15, 54 So. 595, 1910 Miss. LEXIS 4 (Miss. 1910).

The lien of a judgment duly enrolled binds the property in the hands of a subvendee or more remote purchaser from the defendant. Mitchell v. Wood, 47 Miss. 231, 1872 Miss. LEXIS 67 (Miss. 1872).

6. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

Judgment creditors who had obtained judgment liens under the Mississippi judgment lien statutes were held to be judgment lien creditors for the purposes of being excepted from the federal tax lien statute and thus were entitled to priority over the tax claims of the Internal Revenue Service. Merideth v. United States, 327 F. Supp. 429, 1970 U.S. Dist. LEXIS 9382 (N.D. Miss. 1970), aff'd, 449 F.2d 186, 1971 U.S. App. LEXIS 7783 (5th Cir. Miss. 1971).

The lien of judgment in a suit commenced prior to the four months preceding the filing of a bankruptcy petition, to set aside a conveyance as fraudulent, is not affected by the bankruptcy. Davis v. Polk Financial Service, 242 Miss. 419, 135 So. 2d 175, 1961 Miss. LEXIS 578 (Miss. 1961).

Where the trustee in bankruptcy abandoned property owned by the debtor which had brought less than the amount of either of the liens of a chattel mortgagee or judgment creditor when sold, the proceedings in bankruptcy did not affect the rights of the lienholders, and the holder of the judgment lien retained priority to the funds. Brookhaven Bank & Trust Co. v. Gwin, 253 F.2d 17, 1958 U.S. App. LEXIS 4895 (5th Cir. Miss. 1958).

A recorded deed of trust, containing an erroneous description of the land conveyed by the grantor, which recited that the land in question contained 60 acres more or less, whereas the grantor only owned 40 acres, was not sufficient to put the grantor's judgment creditors on notice that an entirely different tract of land was intended to be included, and did not give notice of a description which a diligent search of the records might have disclosed as to other lands belonging to the grantor, so that while the grantee was entitled to a reformation of a trust deed as against the grantor, he was not so entitled as against the judgment creditors, who had executed on the lands actually owned by the grantor. Mississippi Industries for Blind v. Jackson, 231 Miss. 135, 95 So. 2d 109, 1957 Miss. LEXIS 496 (Miss. 1957).

Expenses of last illness and funeral expenses constitute preference claim over enrolled judgment upon which execution has not been issued and levied. Dabney v. Continental Jewelry Co., 163 Miss. 1, 140 So. 338, 1932 Miss. LEXIS 9 (Miss. 1932).

Without deciding the point, it would seem that the lien of an enrolled judgment creditor under this statute is stronger and more far-reaching than that of an execution judgment creditor, and would prevail over the lien of a purchase money creditor. In re Whatley, 30 F.2d 979, 1929 U.S. Dist. LEXIS 1886 (D. Miss. 1929).

The priority given by the statute is lost as against subsequent judgment creditors, and therefore in bankruptcy proceedings, by such holder agreeing to stay execution on his judgment and acting in pursuance of such agreement until bankruptcy supervenes. Winchester-Simmons Co. v. Phillips, 16 F.2d 109, 1926 U.S. App. LEXIS 3769 (5th Cir. Miss. 1926).

One year's provision for a widow is superior to the lien of an enrolled judgment against her husband before his death. First Nat'l Bank v. Donald, 112 Miss. 681, 73 So. 723, 1916 Miss. LEXIS 162 (Miss. 1916).

Where a motion to set aside a judgment for a certain sum is continued and overruled at a subsequent term, but the judgment is allowed to stand for a less sum, a judgment recovered and enrolled during the interval is prior in lien. Crane v. Richardson, 73 Miss. 254, 18 So. 542, 1895 Miss. LEXIS 80 (Miss. 1895).

Even without notice to the senior judgment creditor, a junior judgment creditor is entitled to the proceeds of goods seized and sold under his judgment, pending a stay of execution granted by the senior judgment itself. Virden v. Robinson, 59 Miss. 28, 1881 Miss. LEXIS 68 (Miss. 1881).

Where a creditor refuses to give an indemnifying bond, and another creditor does give it, and a sale is made because thereof, the latter will have a superior right to the proceeds. Townsend v. Henry, 26 Miss. 203, 1853 Miss. LEXIS 75 (Miss. 1853); Dabney v. Stackhouse, 49 Miss. 513, 1873 Miss. LEXIS 139 (Miss. 1873).

Where several judgments are rendered against a defendant on the same day, the judgment which appears first entered on the minutes of the court obtains a prior lien. President & Directors of Bank of Metropolis v. President, Directors & Co. of New England Bank, 42 U.S. 234, 11 L. Ed. 115, 1843 U.S. LEXIS 302 (U.S. 1843); John Reed & Co. v. Haviland, Harral & Co., 38 Miss. 323, 1860 Miss. LEXIS 3 (Miss. 1860); Johnson v. Edde, 58 Miss. 664, 1881 Miss. LEXIS 21 (Miss. 1881); Herron v. Walker, 69 Miss. 707, 12 So. 259, 1892 Miss. LEXIS 16 (Miss. 1892).

If a creditor suspend his execution, he loses his priority of lien. Michie v. Planters' Bank, 5 Miss. 130, 1839 Miss. LEXIS 64 (Miss. 1839); Smith v. Everly, 5 Miss. 178, 1839 Miss. LEXIS 69 (Miss. 1839).

7. Effect of appeal; affirmance of judgment.

A judgment of affirmance in Supreme Court neither satisfies, merges, nor extinguishes the judgment below; and though it be a judgment on the appeal bond against the principal and his sureties, it does not extinguish or destroy the lien of the original judgment. President, Directors & Co. of Planters Bank v. Calvit, 11 Miss. 143, 1844 Miss. LEXIS 57 (Miss. 1844); Kilpatrick v. Dye's Heirs, 12 Miss. 289, 1845 Miss. LEXIS 20 (Miss. 1845); Montgomery v. McGimpsey, 15 Miss. 557, 1846 Miss. LEXIS 185 (Miss. 1846).

RESEARCH REFERENCES

ALR.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 327 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 601.1 (Petition or application – To foreclose judgment lien – Defendant filing for bankruptcy – Plaintiff erroneously not included as judgment creditor).

CJS.

50 C.J.S., Judgments §§ 760, 761 et seq.

Law Reviews.

The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 11-7-193. How priority of lien forfeited.

A junior judgment creditor may give written notice to any senior judgment creditor requiring him to execute his judgment; and if the senior judgment creditor, being so notified, shall fail, neglect or refuse to have execution issued, and levied within ten days from said notice for the satisfaction of his judgment, he shall lose his priority, and the junior judgment creditor may cause execution to issue on his judgment and to be levied on any of the property of the defendant, and the proceeds of a sale thereof shall be applied to the junior judgments so levied.

HISTORY: Codes, 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 758; 1906, § 820; Hemingway's 1917, § 608; 1930, § 612; 1942, § 1556.

Cross References — Loss of priority in attachment, see § 11-33-53.
Execution on judgments, see § 13-3-155.

JUDICIAL DECISIONS

1. In general.

In a dispute between cross-defendants, three judgment creditors, as to priority of their liens, where the debtor's ex-wife filed her lien first, an appraiser filed his lien second, and the ex-wife's attorney filed his last, because the attorney did not provide statutory notice to the appraiser, he could not supplant the wife's lien under Miss. Code Ann. § 11-7-193 for her alleged failure to execute after the attorney sent her such notification; the judgment liens had priority in order of filing. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

The rule that an agreement to waive or postpone execution or laches in the issuance thereof is a fraud upon junior judgment creditors has been superseded by the enactment of a provision fixing a reasonable time of ten days within which the holder of the senior judgment must act or lose his lien. In re Gulfport Furniture Co., 1 F. Supp. 489, 1932 U.S. Dist. LEXIS 1768 (D. Miss. 1932).

By failure to give the statutory notice to the holder of the senior judgment, the junior creditor is deemed to acquiesce in delay. In re Gulfport Furniture Co., 1 F. Supp. 489, 1932 U.S. Dist. LEXIS 1768 (D. Miss. 1932).

Mere delay in withholding a writ of execution without an agreement to do so will not affect the judgment creditor's priority of lien. In re Gulfport Furniture Co., 1 F. Supp. 489, 1932 U.S. Dist. LEXIS 1768 (D. Miss. 1932).

The junior creditor having given the notice and the senior having failed to do as required of him, the former has a prior lien. Curry v. Lampkin & Conner, 51 Miss. 91, 1875 Miss. LEXIS 18 (Miss. 1875).

The section [Code 1942, § 1556] applies to living plaintiffs, who can legally enforce their judgments. Dibble v. Norton, 44 Miss. 158, 1870 Miss. LEXIS 96 (Miss. 1870).

RESEARCH REFERENCES

ALR.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 346 et seq.

CJS.

50 C.J.S., Judgments §§ 797 et seq.

§ 11-7-195. Judgment not a lien out of county unless enrolled.

A judgment or decree rendered in any court of the United States or of this state shall not be a lien upon or bind any property of the defendant situated out of the county in which the judgment or decree was rendered until the plaintiff shall file in the office of the clerk of the circuit court of the county in which such property is situated an abstract of such judgment or decree which has been certified by the clerk of the court in which the same was rendered containing the names of all the parties to such judgment or decree, its amount, the social security or tax identification number of the defendant if such information is known or readily ascertainable, the date of the rendition, and the amount appearing to have been paid thereon, if any. It shall be the duty of the clerk of the circuit court on receiving such abstract and on payment of the fees allowed by law for filing and enrolling the same, to file and forthwith enroll the same on The Judgment Roll, as in other cases. Such judgment or decree shall, from the date of its enrollment, be a lien upon and bind the property of the defendant within the county where it shall be so enrolled. If a foreign judgment has been filed in any county of this state pursuant to Sections 11-7-301 through 11-7-309 and such judgment may be enforced in such county, then, for purposes of this section, such judgment shall be treated as if it had been rendered in such county and may be enrolled on The Judgment Roll in other counties pursuant to the provisions of this section. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state and shall not be enforced or satisfied against any such property.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 14 (3); 1857, ch. 61, art. 262; 1871, § 833; 1880, § 1738; 1892, § 759; 1906, § 821; Hemingway's 1917, § 609; 1930, § 613; 1942, § 1557; Laws, 1991, ch. 416, § 1; Laws, 1995, ch. 565, § 4; Laws, 1997, ch. 342, § 2, eff from and after July 1, 1997.

Cross References — Uniform enforcement of foreign judgments, see § 11-7-301 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Court has no enforcement authority once judgment enrolled.
3. Priority.

1. In general.

The lien of an enrolled judgment does not attach to intangible property, such as vouchers for the payment of money and the right to receive money, and until service of a writ of garnishment or other appropriate writ subjecting such intangible property to the judgment, the lien is inchoate and does not attach. Simmons--Belk, Inc. v. May, 283 So. 2d 592, 1973 Miss. LEXIS 1230 (Miss. 1973).

A judgment does not become a lien until an abstract thereof be filed and the judgment be enrolled, and the lien has priority from the time of the filing and enrolling. Bergen v. State, 58 Miss. 623, 1881 Miss. LEXIS 11 (Miss. 1881); Hamilton-Brown Shoe Co. v. Walker, 67 Miss. 197, 6 So. 713, 1889 Miss. LEXIS 20 (Miss. 1889).

This statute (Laws of 1841, Feb. 6) did not abrogate a lien which had been acquired under a judgment previously obtained, although the latter had not been recorded in the manner required by the statute. Massingill v. Downs, 48 U.S. 760, 12 L. Ed. 903, 1849 U.S. LEXIS 369 (U.S. 1849).

2. Court has no enforcement authority once judgment enrolled.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; no authority was vested in the circuit court over the collection of the judgment once the clerk had enrolled the judgment. Buckley v. Pers. Support Sys., 852 So. 2d 648, 2003 Miss. App. LEXIS 65 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 380 (Miss. 2003).

3. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

ALR.
Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court. 13 A.L.R.4th 1109.

Am. Jur.
46 Am. Jur. 2d, Judgments §§ 338 et seq.

CJS.
50 C.J.S., Judgments § 750.

§ 11-7-197. Judgment not a lien in county until enrolled.

Judgments and decrees, at law or in equity, rendered in any court of the United States held within this state, or in the Supreme Court or the court of chancery of this state, shall not be a lien upon or bind the property of the defendant within the county in which such judgments or decrees may be rendered, until an abstract thereof shall be filed in the office of the clerk of the circuit court of the county and enrolled on the judgment roll, in the manner and on the terms hereinbefore provided in Section 11-7-195. Such judgments and decrees shall bind the property of the defendants from the date of such enrollment, in like manner as judgments and decrees rendered in a different county and so enrolled.

HISTORY: Codes, 1857, ch. 61, art. 263; 1871, § 834, 1880, § 1739; 1892, § 760; 1906, § 822; Hemingway's 1917, § 610; 1930, § 614; 1942, § 1558.

Cross References — Duty of chancery clerk to furnish circuit clerk with abstract of money decrees, see § 9-5-159.

Uniform enforcement of foreign judgments, see § 11-7-301 et seq.

Record of decrees making partition of land, see § 11-21-37.

Limitation of action on foreign judgment, see § 15-1-45.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Court has no enforcement authority once judgment enrolled.
3. Priority.

1. In general.

Where a chancery court found in favor of the purchaser of a warranty timber deed in a breach of contract action in which it was determined that the seller of the deed did not have legal title to the land, the chancery court erred in denying the purchaser a judgment lien on the property pursuant to Miss. Code Ann. § 11-7-191 and Miss. Code Ann. § 11-7-197 because the judgment constituted a lien on the property once the judgment was enrolled. Gordon v. Gordon, 929 So. 2d 981, 2006 Miss. App. LEXIS 395 (Miss. Ct. App. 2006).

Although inmate could have enrolled bankruptcy court's judgment fixing amount the lawyer owed the inmate as a result of the lawyer's breach of agreement and obtained a judgment lien as a result, the evidence did not show that the inmate did so; as a result, the trial court did not err in denying his motion for writ of garnishment. Estelle v. Robinson, 805 So. 2d 623, 2002 Miss. App. LEXIS 37 (Miss. Ct. App. 2002).

2. Court has no enforcement authority once judgment enrolled.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; no authority was vested in the circuit court over the collection of the judgment once the clerk had enrolled the judgment. Buckley v. Pers. Support Sys., 852 So. 2d 648, 2003 Miss. App. LEXIS 65 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 380 (Miss. 2003).

3. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

Am. Jur.

46 Am. Jur. 2d, Judgments §§ 332—334 et seq.

CJS.

50 C.J.S., Judgments §§ 781 et seq.

§ 11-7-199. Growing crop not subject to judgment lien.

A growing crop shall not be subject to the lien of a judgment.

HISTORY: Codes, 1880, § 1764; 1892, § 761; 1906, § 823; Hemingway's 1917, § 611; 1930, § 615; 1942, § 1559.

Cross References — Provision for growing crops in cases of unlawful entry and detainer, see § 11-25-115.

Prohibition against levying execution on growing crops, see § 13-3-137.

Duty of executor with respect to crop growing at the time of death of testator, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.

When cotton is ready to harvest, it is not "growing crop", and judgment lien then attaches. Harris v. Harris, 150 Miss. 729, 116 So. 731, 1928 Miss. LEXIS 138 (Miss. 1928).

Trust deed, executed after levy by sheriff under execution upon matured ungathered crop of cotton, cannot prevail as against judgment creditor. Harris v. Harris, 150 Miss. 729, 116 So. 731, 1928 Miss. LEXIS 138 (Miss. 1928).

RESEARCH REFERENCES

CJS.
50 C.J.S., Judgments § 784.

§ 11-7-201. Revival not necessary for execution.

It shall not be necessary to revive a judgment by scire facias because no execution shall have been issued on such judgment within a year and a day after its rendition, but execution may be issued without such revival.

HISTORY: Codes, 1857, ch. 61, art. 266; 1871, § 838; 1880, § 1741; 1892, § 762; 1906, § 824; Hemingway's 1917, § 612; 1930, § 616; 1942, § 1560.

Cross References — Revival of judgment by scire facias, see § 13-3-153.

RESEARCH REFERENCES

ALR.
Reviving, renewing, or extending judgment by order entered after statutory limitation period on motion made or proceeding commenced within such period. 52 A.L.R.2d 672.

Am. Jur.
46 Am. Jur. 2d, Judgments §§ 365- 387.

CJS.
50 C.J.S., Judgments §§ 854-868.

§§ 11-7-203 through 11-7-209. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-203. [Codes, 1880, § 1756; 1892, § 763; 1906, § 825; Hemingway's 1917, § 613; 1930, § 617; 1942, § 1561]

§ 11-7-205. [Codes, Hutchinson's 1848, ch. 61, art. 1 (145); 1857, ch. 61, art. 162; 1871, § 644; 1880, § 1715; 1892, § 733; 1906, § 974; Hemingway's 1917, § 578; 1930, § 587; 1942, § 1531]

§ 11-7-207. [Codes, 1880, § 1718; 1892, § 735; 1906, § 796; Hemingway's 1917, § 580; 1930, § 589; 1942, § 1533]

§ 11-7-209. [Codes, 1857, ch. 61, art. 164; 1871, § 646; 1880, § 1717; 1892, § 737; 1906, § 798; Hemingway's 1917, § 586; 1930, § 590; 1942, § 1534]

Editor's Notes — Former § 11-7-203 provide for suspension of judgment.
Former § 11-7-205 was entitled: Bills of exceptions – in civil cases.
Former § 11-7-207 was entitled: When bills of exceptions signed.
Former § 11-7-209 was entitled: Exceptions, bill of – when attorneys may sign.

§ 11-7-211. Bills of exception may be amended.

Bills of exception, with the approval of the trial judge, may be amended at any time before the hearing on appeal, for the purpose of curing omissions, defects, or inaccuracy; but no such amendment shall be made until the parties interested shall have been given five days' notice of such proposed amendment.

HISTORY: Codes, 1906, § 799; Hemingway's 1917, § 587; 1930, § 591; 1942, § 1535.

Cross References — Another section derived from same 1942 code section, see § 99-17-45.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

A proposed amendment to a bill of exceptions, which gave some support to the defendant's allegation that he had requested and been denied a preliminary examination, was not properly a part of the record in the case, where the amendment had not been approved or consented to by the trial court. Stevenson v. State, 244 So. 2d 30, 1971 Miss. LEXIS 1324 (Miss. 1971).

Corrections of errors in bill of exceptions, where testimony is taken down by court's stenographer, must take place in trial court, except as provided by this section [Code 1942, § 1535]. Williams v. W. M. Hardee & Son, 140 Miss. 151, 106 So. 16, 1925 Miss. LEXIS 243 (Miss. 1925).

The trial court may amend a special bill of exceptions before the expiration of the term of court. Archer v. State, 140 Miss. 597, 105 So. 747, 1925 Miss. LEXIS 295 (Miss. 1925).

This section [Code 1942, § 1535] has no application where an instruction is marked "given" by the court and also marked "filed" by the clerk, for such instruction then becomes a part of the record. Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582, 1920 Miss. LEXIS 484 (Miss. 1920).

To amend a bill of exceptions the trial judge must consent thereto. Ladnier v. Ingram Day Lumber Co., 122 Miss. 577, 84 So. 385, 1920 Miss. LEXIS 455 (Miss. 1920).

2. Illustrative cases.

Where, in response to appellant's motion to supplement the record, a school board filed an amended bill of exceptions, although appellant had only three days' notice of the proposed amendment, its motion to strike the amended bill was properly denied because any deficiency in notice did not affect its substantial rights. Rod Cooke Constr. Co. v. Lamar County Sch. Bd., 135 So. 3d 902, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. 2013), cert. denied, 136 So. 3d 437, 2014 Miss. LEXIS 204 (Miss. 2014).

RESEARCH REFERENCES

ALR.

Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

Am. Jur.

5 Am. Jur. 2d, Appellate Review § 420.

CJS.

4 C.J.S., Appeal and Error §§ 199, 591.

§§ 11-7-213 and 11-7-215. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-213. [Codes, Hutchinson's 1848, ch. 61, art. 1 (73); 1857, ch. 61, art. 165; 1871, § 647; 1880, § 1719; 1892, § 738; 1906, § 800; Hemingway's 1917, § 588; 1930, § 592; 1942, § 1536; Laws, 1956, ch. 230]

§ 11-7-215. [Codes, 1857, ch. 61, art. 168; 1871, § 648; 1880, § 1720; 1892, § 739; 1906, § 801; Hemingway's 1917, § 589; 1930, § 593; 1942, § 1537]

Editor's Notes — Former § 11-7-213 directed that new trials be granted only on terms directed by the court and two to same party.

Former § 11-7-215 was entitled: New trials – That only two be granted to the same parts granting or refusing assignable for error.

§ 11-7-217. Executions of fines, penalties, and forfeitures.

The clerk of the circuit court shall, immediately after the adjournment of every term, issue execution according to the nature of the case, for all fines, penalties and forfeitures assessed by the court, or which shall have accrued to the state or to the county, and remaining due and unpaid. Said clerk shall, within thirty days after such adjournment, transmit a list of said executions to the clerk of the board of supervisors of the county, noting the names of the defendants, the amounts, and the sheriff or other officer to whom the same was delivered; and, at the same time, he shall transmit to said clerk a statement of the returns made by the sheriff or other officer on execution for fines, penalties, and forfeitures returnable to the last term of the court. Any circuit court clerk who shall fail to issue such executions, or to transmit the lists thereof as required, shall forfeit and pay the sum of two hundred dollars for every such offense, to be recovered by the state or county, on motion against him and his sureties by the district attorney, before the circuit court. The clerk of the board of supervisors shall notify the district attorney of such default.

HISTORY: Codes, 1857, ch. 61, art. 304; 1871, § 867; 1880, § 1785; 1892, § 764; 1906, § 826; Hemingway's 1917, § 614; 1930, § 618; 1942, § 1562.

Cross References — Duty of clerk of the justice court to collect and report fines, see § 9-11-19.

Collection of costs, see § 11-53-69.

Duty of clerk of board of supervisors, see § 19-3-27.

Duty of district attorney as to fines and penalties, see § 25-31-23.

Another section derived from same 1942 code section, see § 99-19-65.

RESEARCH REFERENCES

Am. Jur.
15A Am. Jur. 2d, Clerks of Court §§ 51, 56, 57.

CJS.
21 C.J.S., Courts §§ 327-351.

§ 11-7-219. Remedy against officers, failing to return fines.

If any sheriff or other officer shall return on any such writ of execution, that he hath levied the fine, penalty, or forfeiture therein mentioned, or any part thereof; or, that he hath taken the body of the defendant, and shall have suffered such defendant to escape; or, if any person be committed to the custody of such sheriff or other officer until the fine, penalty, or forfeiture for which he was committed shall be paid, and such sheriff or officer shall permit such defendant to escape; or, if such sheriff or officer shall have received such fine, penalty, or forfeiture, or any part thereof, and shall not immediately account to the clerk of the board of supervisors and pay the same into the treasury of the county, then, in either of the cases above specified, it shall be the duty of said clerk to notify the district attorney of such default, who shall thereupon, on motion at the next term of the circuit court, demand judgment against such sheriff, or other officer, and his sureties, for the fines, penalties, and forfeitures mentioned in such writs, or for so much thereof as he shall have received on such execution or commitment, or the whole amount thereof in case he shall have suffered such defendant or defendants to escape; and the court shall give judgment accordingly, and award execution thereon.

HISTORY: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; 1906, § 828; Hemingway's 1917, § 616; 1930, § 619; 1942, § 1563.

Cross References — Actions against officers for money collected or property taken, see §§ 9-7-89, 11-23-3.

Liability of clerk of the justice court for money collected, see § 9-11-23.

Failure of constable to execute and return execution, see § 19-19-9.

Liability of sheriff for mishandling money collected, see § 19-25-39 et seq.

Duty of legal representative to promptly pay public monies of deceased officer, see § 25-1-67.

Duty and liability of public officer for depositing and distributing public funds, see §§ 25-1-69 through 25-1-73.

Another section derived from same 1942 code section, see § 99-19-67.

RESEARCH REFERENCES

Am. Jur.

63C Am. Jur. 2d, Public Officers and Employees §§ 335- 356.

CJS.

67 C.J.S., Officers and Public Employers §§ 178-192.

§ 11-7-221. Liability of officers for default as to fines.

Clerks, sheriffs, and other officers shall be liable to the same proceedings for any neglect of duty, in respect to executions for fines, penalties, and forfeitures, as in case of executions in civil cases.

HISTORY: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; 1906, § 828; Hemingway's 1917, § 616; 1930, § 620; 1942, § 1564.

Cross References — Motions against officers for money collected, see § 9-7-89.

Another section derived from same 1942 code section, see § 99-19-69.

JUDICIAL DECISIONS

1. In general.

A clerical omission to place an order on the minutes of the proper term is always subject to correction at any succeeding term. Powers v. State, 83 Miss. 691, 36 So. 6, 1903 Miss. LEXIS 90 (Miss. 1903), overruled, Jones v. State, 144 Miss. 52, 109 So. 265, 1926 Miss. LEXIS 341 (Miss. 1926).

RESEARCH REFERENCES

Am. Jur.
63C Am. Jur. 2d, Public Officers and Employees §§ 344, 345, 347, 358, 365.

CJS.
67 C.J.S., Officers and Public Employees §§ 186-191.

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS

Sec.	
11-7-301.	Definition.
11-7-303.	Filing copy of foreign judgment; enforcement.
11-7-305.	Affidavit of filing; notice; execution.
11-7-307.	Appeal; stay of execution; security.
11-7-309.	Alternative rights of judgment creditor.

§ 11-7-301. Definition.

In Sections 11-7-301 through 11-7-309 "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

HISTORY: Laws, 1984, ch. 403, § 1, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

Comparable Laws from other States — Alabama: Code of Ala. §§ 6-9-230 through 6-9-238.
Arizona: A.R.S. §§ 12-1701 through 12-1708.
Arkansas: A.C.A. §§ 16-66-601 through 16-66-608.
Colorado: C.R.S. §§ 13-53-101 through 13-53-108.
Connecticut: Conn. Gen. Stat. §§ 52-604 through 52-609.
Delaware: 10 Del. C. §§ 4781 through 4787.
District of Columbia: D.C. Code §§ 15-351 through 15-357.
Florida: Fla. Stat. §§ 55.501 through 55.509.
Georgia: O.C.G.A. §§ 9-12-130 through 9-12-138.
Hawaii: H.R.S. §§ 636C-1 through 636C-8.
Idaho: Idaho Code § 10-1301 et seq.
Iowa: Iowa Code §§ 626A.1 through 626A.8.
Kansas: K.S.A. §§ 60-3001 through 60-3008.
Kentucky: K.R.S. §§ 426.950 through 426.990.
Maine: 14 M.R.S. §§ 8001 through 8008.
Maryland: Md. Courts and Judicial Proceedings Code Ann. §§ 11-801 through 11-807.
Minnesota: Minn. Stat. §§ 548.26 through 548.33.
Missouri: Mo. Rev. Stat. § 511.760.
Montana: Mont. Code Anno. §§ 25-9-501 through 25-9-508.
Nebraska: R.R.S. Neb §§ 25-1587.01 through 25-1587.09.
Nevada: Nev. Rev. Stat. Ann. §§ 17.330 through 17.400.
New Hampshire: R.S.A. §§ 524-A:1 through 524-A:8.
New Jersey: N.J. Stat. §§ 2A:49A-25 through 2A:49A-33.
New Mexico: N.M. Stat. Ann. §§ 39-4A-1 through 39-4A-6.
New York: NY CLS CPLR §§ 5401 through 5408.
North Carolina: N.C. Gen. Stat. §§ 1C-1701 through 1C-1761.
North Dakota: N.D. Cent. Code §§ 28-20.1-01 through 28-20.1-08.
Ohio: O.R.C §§ 2329.021 through 2329.12.

Oklahoma: 12 Okl. St. §§ 719 through 726.
Oregon: O.R.S. §§ 24.105 through 24.175.
Pennsylvania: 42 Pa.C.S. § 4306.
Rhode Island: R.I. Gen. Laws §§ 9-32-1 through 9-32-8.
South Carolina: S.C. Code Ann. §§ 15-35-900 through 15-35-960.
South Dakota: S.D. Codified Laws §§ 15-16A-1 through 15-16A-10.
Tennessee: Tenn Code. Ann. §§ 26-6-101 through 26-6-107.
Texas: Tex. Civ. Prac. & Rem. Code §§ 35.001 through 35.008.
Utah: Utah Code Ann. §§ 78-22a-1 through 78-22a-8.
Virgin Islands: 5 V.I.C. 551 through 558.
Virginia: Va. Code Ann. §§ 8.01-465.1 through 8.01-465.5.
Washington: Rev. Code Wash. §§ 6.36.010 through 6.36.910.
West Virginia: W. Va. Code §§ 55-14-1 through 55-14-8.
Wisconsin: Wis. Stat. § 806.24.
Wyoming: Wyo. Stat. 1-17-701 through 1-17-707.

JUDICIAL DECISIONS

1. Courts.

Circuit court properly granted summary judgment to a bankruptcy trustee and allowed its foreign bankruptcy judgment to be enrolled because the judgment debtor raised no dispute of material facts in the enrollment action or evidence supporting either of the recognized exceptions to the requirement of giving full faith and credit to foreign judgments, and the judgment debtor also failed to set forth any facts supporting a procedural-due-process violation. Price v. Pereira, 172 So. 3d 1168, 2014 Miss. App. LEXIS 319 (Miss. Ct. App. 2014).

A judgment rendered by a so-called "Constitutional District Court of Common Law" in Arkansas simply did not exist in the eyes of the Constitution or statutes of the United States, the states of Mississippi, Arkansas or any other state and, therefore, such judgment was not enforceable in Mississippi under the Uniform Enforcement of Foreign Judgments Act. Tennessee Props., Inc. v. Southern Pilot Ins. Co., 766 So. 2d 44, 2000 Miss. App. LEXIS 312 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

Uniform Enforcement of Foreign Judgment Act. 72 A.L.R.2d 1255.

Requirement of full faith and credit to foreign judgment for punitive damages. 44 A.L.R.3d 960.

Construction and application of Uniform Foreign Money – Judgment Recognition Act. 100 A.L.R.3d 792.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 A.L.R.4th 706.

Construction and application of Uniform Foreign Money – Judgments Recognition Act. 88 A.L.R.5th 545.

Am. Jur.

47 Am. Jur. 2d Judgments §§ 690 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 89 (petition or application-for registration of foreign judgment).

CJS.

50 C.J.S. Judgments § 1297.

Law Reviews.

Hoffheimer, Mississippi Conflict of Laws. 67 Miss. L. J. 175 1997.

§ 11-7-303. Filing copy of foreign judgment; enforcement.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state or any rule promulgated and adopted by the Mississippi Supreme Court may be filed in the office of the clerk of the circuit court of any county in this state. Said clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any county in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of any county in this state and may be enforced or satisfied in like manner, subject to the provisions of Section 15-1-45. Any foreign judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

HISTORY: Laws, 1984, ch. 403, § 2; Laws, 1991, ch. 371, § 1; Laws, 1995, ch. 565, § 5, eff from and after July 1, 1995.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Requirements.

1. In general.

Mississippi is required by the United States Constitution, Art. IV, Sec. 1, to give full faith and credit to all final judgments of other states and federal courts unless (1) the foreign judgment was obtained as a result of some false representation without which the judgment would not have been rendered, or (2) the rendering court did not have jurisdiction over the parties or the subject matter; however, in order to challenge a foreign judgment on this ground, it is necessary that the challenge be timely and properly filed in Mississippi pursuant to § 15-1-45. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

In order for full faith and credit to apply, the foreign court must have addressed the merits of the case in rendering its judgment. However, this general rule does not apply if the rendering court did not have jurisdiction over the parties or the subject matter or if the foreign judgment itself was obtained as a result of some false representation without which the judgment would not have been rendered. If a foreign judgment is collaterally attacked on subject matter grounds, the court may consider extrinsic evidence only to show that the foreign judgment is void. When the attack is on grounds of extrinsic fraud, a distinction must be made between fraud involving the merits and fraud which enables a party to procure a judgment that he or she otherwise would not have obtained. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

The procedure for properly enrolling a foreign judgment in Mississippi is as follows: (1) the judgment creditor must file an affidavit and a copy of the foreign judgment with the circuit court; (2) the circuit clerk promptly mails notice to the judgment debtor; and (3) no action may be taken for 20 days after the foreign judgment is filed. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

The requirements of full faith are tempered by some basic limitations. The primary limitation is that full faith and credit does not apply if the rendering court did not have jurisdiction over the parties in the subject matter. When a foreign judgment is collaterally attacked on subject matter grounds, extrinsic evidence is admissible, but only to show that the foreign judgment is void. The courts of this state may inquire into no question other than those which would be considered upon collateral attack in the state in which the judgment was rendered. If the law of the state where the judgment was obtained would require the courts of that state to grant relief to the judgment debtor, this state will similarly grant relief. Sollitt v. Robertson, 544 So. 2d 1378, 1989 Miss. LEXIS 282 (Miss. 1989).

2. Requirements.

Dismissal of enrollment and enforcement of an Ohio judgment rendered against a Mississippi corporation was appropriate because the Ohio court did not have personal jurisdiction over the corporation because, although the corporation initiated contact with an Ohio limited liability company through a request for a bid and negotiated a contract with the company for training in Mississippi, the corporation did not transact any business in Ohio under Ohio's long arm-statute and due process requirements for personal jurisdiction in Ohio were not met. AquaSeal Resurfacing LLC v. Jefcoat Rec. & Constr., Inc., — So. 3d —, 2019 Miss. App. LEXIS 112 (Miss. Ct. App. Mar. 26, 2019).

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; the clerk issued the writ returnable to the circuit court, an act not authorized until the requirements of the Uniform Enforcement of Foreign Judgments Act (Act), Miss. Code Ann. §§ 11-7-301 to 11-7-309, were met. Buckley v. Pers. Support Sys., 852 So. 2d 648, 2003 Miss. App. LEXIS 65 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 380 (Miss. 2003).

§ 11-7-305. Affidavit of filing; notice; execution.

(1) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of the circuit court, as the case may be, an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(3) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until twenty (20) days after the date the judgment is filed.

HISTORY: Laws, 1984, ch. 403, § 3, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS

1. In general.

Circuit court did not err in giving full faith and credit to a North Carolina judgment and ordering the judgment debtor's bank to disburse the garnished funds to the judgment creditor's attorney because the debtor's arguments regarding lack of notice and punitive damages were barred by res judicata and untimely where the debtor failed to contest the enrollment of the judgment within the 20 days allowed by statute, and the record reflected no motion for a new trial or direct appeal of the judgment. Eagle Green Energy, Inc. v. Forsite Dev., Inc., 225 So. 3d 565, 2017 Miss. App. LEXIS 501 (Miss. Ct. App. 2017).

Doctor enrolled the New Mexico judgment on March 3, 1999, and the clerk mailed notice of the enrollment on that date, and the attorney then had 20 days to contest the enrollment of the judgment; where the attorney's response was filed on April 28, 1999, outside the 20-day limit, the attorney's defenses to the enrollment which alleged false representations by the doctor were not properly before the trial court. Schwartz v. Hynum, 933 So. 2d 1039, 2006 Miss. App. LEXIS 521 (Miss. Ct. App. 2006).

The procedure for properly enrolling a foreign judgment in Mississippi is as follows: (1) the judgment creditor must file an affidavit and a copy of the foreign judgment with the circuit court; (2) the circuit clerk promptly mails notice to the judgment debtor; and (3) no action may be taken for 20 days after the foreign judgment is filed. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

An ex-husband's filing of a suit in tort against his ex-wife was not a proper response to her attempt to enforce foreign judgments for unpaid child support and attorney's fees, in spite of his argument that the law suit was a consolidated answer to the efforts to enroll and execute on the 4 judgments. Even if the law suit were a timely and proper response, it would otherwise fail because the record reflected proper notice in accordance with § 11-7-301 et seq., and the "response" collaterally attacked the validity and amounts of the underlying judgments which may not be attacked in Mississippi. Thus, the judgments were entitled to full faith and credit in Mississippi. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

§ 11-7-307. Appeal; stay of execution; security.

(1) If the judgment debtor shows the circuit court of any county that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(2) If the judgment debtor shows the circuit court of any county any ground upon which enforcement of a judgment of any court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

HISTORY: Laws, 1984, ch. 403, § 4, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS

1. In general.

An ex-husband's filing of a suit in tort against his ex-wife was not a proper response to her attempt to enforce foreign judgments for unpaid child support and attorney's fees, in spite of his argument that the law suit was a consolidated answer to the efforts to enroll and execute on the 4 judgments. Even if the law suit were a timely and proper response, it would otherwise fail because the record reflected proper notice in accordance with § 11-7-301 et seq., and the "response" collaterally attacked the validity and amounts of the underlying judgments which may not be attacked in Mississippi. Thus, the judgments were entitled to full faith and credit in Mississippi. Davis v. Davis, 558 So. 2d 814, 1990 Miss. LEXIS 19 (Miss. 1990).

RESEARCH REFERENCES

Law Reviews.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L.J. 49, March, 1985.

§ 11-7-309. Alternative rights of judgment creditor.

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under Sections 11-7-301 through 11-7-309 remains unimpaired.

HISTORY: Laws, 1984, ch. 403, § 5, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

CHAPTER 9.

PRACTICE AND PROCEDURE IN COUNTY COURTS AND JUSTICE COURTS

Article 1. County Courts. 11-9-1
Article 3. Justice Courts. 11-9-101

ARTICLE 1.

COUNTY COURTS.

Sec.
11-9-1. Writs returnable to other courts may be made returnable to county court; acts of justice court judge, clerk, judge, chancellor, or other officer may be done in behalf of county court.
11-9-3. Venue of actions, suits and proceedings.

§ 11-9-1. Writs returnable to other courts may be made returnable to county court; acts of justice court judge, clerk, judge, chancellor, or other officer may be done in behalf of county court.

Whenever under any statute a writ is made returnable to, or the institution of any suit or proceeding is required to be in, a justice court, general or special, or a circuit or chancery court, or when in respect to such matters any justice court judge, or clerk, or judge or chancellor, or other officer, is empowered to do any act in or about any of said courts, the said writs may be made returnable to the county court in any cause or matter there pending or which, within its jurisdiction, is there to be instituted, and all the said acts of the officers aforesaid may be done in behalf of or in respect to the county court in all such matters and causes to the same extent as had the county court been expressly included in each and every of such statutes first aforementioned.

HISTORY: Codes, 1930, § 696; 1942, § 1607; Laws, 1926, ch. 131; Laws, 1991, ch. 573, § 22, eff from and after July 1, 1991.

Cross References — Judges, terms, general powers and duties of county courts, see § 9-9-1 et seq.

Rules of pleading and practice in chancery courts in general, see § 11-5-1 et seq.

Rules of pleading in civil cases in circuit court, see § 11-7-1 et seq.

Application to all courts of circuit court civil practice provisions, see § 11-7-1.

Partition of personalty by county court or justice court judges, see § 11-21-73.

Unlawful entry and detainer proceedings in county court, see § 11-25-101 et seq.

Suits against state or its political subdivisions, see § 11-45-1 et seq.

Rule that plaintiff's attorney must state residence of plaintiff upon demand of defendant, see § 11-49-1.

Rules of evidence generally, see § 13-1-1 et seq.

Process, notice and publication generally, see § 13-3-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Procedural rules applicable to practice in Mississippi circuit and county courts, see URCCC 1.01 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Pleading and practice.

1. In general.

In a prosecution for contributing to the delinquency of a minor, where the affidavit was amended to add public drunkenness as an additional act and the record did not disclose any evidence as to surprise and there was no motion by defendant for continuance nor process for additional witnesses, the defendant could not now complain of the amendment. Hall v. State, 211 Miss. 90, 50 So. 2d 924, 1951 Miss. LEXIS 334 (Miss. 1951).

The fact that a capias for arrest on a misdemeanor charge was issued on the affidavit of the county prosecuting attorney, by the clerk of the county court without any order therefor from the county judge, did not render it invalid, or avoid jurisdiction, by the court over the person of the defendant, since, inasmuch as the affidavit of the county prosecuting attorney took the place of an indictment in the circuit court, the process on the charge of misdemeanor so made was a capias to be issued by the clerk of the county court. Cooper v. State, 193 Miss. 672, 10 So. 2d 764, 1942 Miss. LEXIS 156 (Miss. 1942).

To confer jurisdiction on county court in misdemeanor case, State need only allege and prove crime was committed in county. Webb v. State, 158 Miss. 715, 131 So. 262, 1930 Miss. LEXIS 108 (Miss. 1930).

Rules of practice and procedure of justice, chancery, and circuit courts in cases within county court jurisdiction, and in force when county court was established, are applicable to county courts. Speir v. Moseley, 158 Miss. 63, 130 So. 53, 1930 Miss. LEXIS 18 (Miss. 1930); Forrest County v. Thompson, 204 Miss. 628, 37 So. 2d 787, 1948 Miss. LEXIS 395 (Miss. 1948).

2. Pleading and practice.

County court's allowance of an amendment correcting description of certain tires and tubes and making the description applicable to both the declaration and affidavit, was proper exercise of its discretion in light of the fact that the defendants were not prejudiced. Hannan Motor Co. v. Darr, 212 Miss. 870, 56 So. 2d 64, 1952 Miss. LEXIS 320 (Miss. 1952).

Since an action of replevin, prior to the creation of county courts, would have been in the jurisdiction of the circuit court, under this section, the procedure in such action in the county court must be the same that it would have been in the circuit court. Winn v. Eatherly, 187 Miss. 159, 192 So. 431, 1939 Miss. LEXIS 98 (Miss. 1939).

Under this section [Code 1942, § 1607], an eminent domain proceeding should be tried in the county court upon a full hearing and the giving of appropriate instructions for the parties, as in other civil causes tried in such court, and it was error to limit the instruction to the one provided in Code 1942 § 2760, with respect to such proceedings before a justice of the peace, requiring a trial de novo in the circuit court. Mississippi State Highway Com. v. Reddoch, 184 Miss. 302, 186 So. 298, 1939 Miss. LEXIS 53 (Miss. 1939).

In unlawful entry and detainer action in county court, error in pleadings held not to affect judgment where case was tried on merits on evidence that would have been proper and necessary had pleadings been in accord with statute. Holmes v. Elmer, 182 Miss. 171, 181 So. 325, 1938 Miss. LEXIS 171 (Miss. 1938).

In view of the provision of this section [Code 1942, § 1607] that in all matters taken away from the jurisdiction of other courts and given to the jurisdiction of the county court, the pleadings, practice, and procedure shall be the same in the county court as in the courts formerly having jurisdiction of such matters, it is plain that the legislature did not intend to repeal in its entirety the chapter on eminent domain. Mississippi State Highway Dep't v. Haines, 162 Miss. 216, 139 So. 168, 1932 Miss. LEXIS 121 (Miss. 1932).

§ 11-9-3. Venue of actions, suits and proceedings.

The venue of actions, suits and proceedings in the county court shall be the same as that now generally provided, or which may hereafter be provided with respect to the particular action, suit or proceedings. Provided, however, that all suits and matters filed in the county court which, if there were no county court, would be triable in the justice court, shall be tried at the courthouse of the county or courthouse of the proper judicial district in counties having two (2) circuit and chancery court districts therein.

HISTORY: Codes, 1930, § 695; 1942, § 1606; Laws, 1926, ch. 131; Laws, 1981, ch. 471, § 23; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Venue of civil actions or suits generally, see § 11-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

Jurisdiction of county court in misdemeanor case is coextensive with boundary of county wherein offense was committed, and venue of crime is that county. Webb v. State, 158 Miss. 715, 131 So. 262, 1930 Miss. LEXIS 108 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Venue in action for malicious prosecution. 12 A.L.R.4th 1278.

ARTICLE 3.

JUSTICE COURTS.

Sec.

11-9-101. Where suits to be brought.
11-9-103. If two or more defendants, where brought.
11-9-105. How suit begun in civil cases.
11-9-107. Service of process by sheriff or constable.
11-9-109. Person appointed to execute process.
11-9-111. Property and process delivered to office.
11-9-113. Process returned by sheriff or constable.
11-9-115. Witnesses to be subpoenaed.

Sec.
11-9-117. Form of entry on default of witness.
11-9-119. Form of scire facias for witness.
11-9-121. Form of an attachment for a witness.
11-9-123. Form of entry of judgment in such case.
11-9-125. Setoff filed on return day before trial.
11-9-127. Trial and judgment; execution.
11-9-129. Judgment operates as a lien if enrolled.
11-9-131. Execution not to be issued within ten days.
11-9-133. Form of an execution.
11-9-135. Proceedings in replevin, attachment, liens.
11-9-137. Judgment on merits res adjudicata.
11-9-139. Execution of judgment may be stayed.
11-9-141. Effect of stay.
11-9-143. Trial by jury.
11-9-145. Multiple cases tried by same jury.
11-9-147. Trial by jury; fining of delinquent jurors.

§ 11-9-101. Where suits to be brought.

(1) The jurisdiction of the justice court shall be coextensive with its county, and any process may be issued in matters within its jurisdiction, to be executed in any part of the county. Every defendant may be sued only in the county in which he resides or where the cause of action arose and if a defendant does not reside in the State of Mississippi or has no fixed place of residence, he shall be sued in the county where the cause of action arose. Whenever by reason of interest, relationship to one of the parties, or other like cause, any justice court judge shall be disqualified to preside in any case before him, the same shall be transferred to a justice court judge in the county, free from such objection, who shall hear and determine the same. Nothing herein contained shall be construed as authorizing or empowering the clerk of the justice court or any justice court judge to perform any official act outside of the territorial boundaries of their county.

(2) The provisions of this section shall not apply to any cause of action commenced before January 1, 1984; and any such action shall be concluded in accordance with state law as it was constituted before that date.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (10); 1857, ch. 58, art. 8; 1871, §§ 1303, 1340; 1880, §§ 2191, 2231; 1892, § 2395; 1906, § 2724; Hemingway's 1917, § 2223; 1930, § 2072; 1942, § 1806; Laws, 1955 Ex. ch. 40; Laws, 1960, ch. 238; Laws, 1981, ch. 471, § 1; Laws, 1982, ch. 423, § 1; Laws, 1992, ch. 389 § 1, eff from and after passage (approved April 27, 1992).

Editor's Notes — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, effective from and after March 31, 1982).

Cross References — Election, general powers and duties of justice court judges, see § 9-11-1 et seq.

Partition of personalty by county court or justice court judges, see § 11-21-73.

Trial of right of property in justice court judges, see § 11-23-25 et seq.

Unlawful entry and detainer proceedings before justice court judges, see § 11-25-1 et seq.

Attachment at law against debtors, see § 11-33-1 et seq.

Garnishment proceedings, see § 11-35-1 et seq.

Rules of evidence generally, see § 13-1-1 et seq.

Process, notice and publication generally, see § 13-3-1 et seq.

Where suits against incorporated cities, villages, or towns are to be brought, see § 21-1-5.

Prosecutions before justice court judges, see § 99-33-1 et seq.

Procedural rules applicable to practice in Mississippi justice courts, see Uniform Rules of Procedure for Justice Court, Rule 1.01 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction in general.
3. Process.
4. Freeholders or householders determined.
5. Venue.
6. —District of defendant's residence.
7. —Where contract made or liability incurred.
8. —Situs of property.
9. —Actions against nonresidents.
10. Transfer of actions.
11. —Disqualification of justice.
12. Waiver.

1. In general.

Mississippi criminal statutory fees systems for compensating justices of the peace in Hinds and DeSoto Counties are violative of defendant's due process rights to trial before impartial tribunal under the Tumey-Ward test, where the possibility existed that judges in the aforementioned counties would compete for business by currying favor with arresting officers or taking biased actions to increase their case load, and where a judge might minimize the burden of proof required to convict the defendant or might be less than diligent in protecting the defendant's constitutional rights. Brown v. Vance, 637 F.2d 272, 1981 U.S. App. LEXIS 20552 (5th Cir. Miss. 1981).

This section [Code 1942, § 1806] does not affect the provision (Code 1942, § 2955) requiring actions against a county to be brought in the court sitting at the county site, notwithstanding joinder of an individual as joint defendant. Simpson v. Neshoba County, 157 Miss. 217, 127 So. 692, 1930 Miss. LEXIS 267 (Miss. 1930).

This section [Code 1942, § 1806] has no application to a bastardy proceeding which is governed by Code of 1892, § 249 [Code of 1942, § 383]. Johnson v. Walker, 86 Miss. 757, 39 So. 49, 1905 Miss. LEXIS 94 (Miss. 1905).

2. Jurisdiction in general.

Where a prosecution charging trespass upon land originated in the district of a certain justice of the peace, a justice of the peace of another district of the same county was not without jurisdiction to try the case, since the jurisdiction of every justice of the peace is coextensive with his county, and he is authorized to issue any process in matters within his jurisdiction, to be executed in any part of his county. Walker v. State, 192 Miss. 409, 6 So. 2d 127, 1942 Miss. LEXIS 25 (Miss. 1942).

Jurisdiction of justice of peace of transitory causes of action against nonresidents is as complete as that of circuit courts, except as to amount. McDonough v. Stringer, 155 Miss. 179, 124 So. 334, 1929 Miss. LEXIS 280 (Miss. 1929).

A justice of the peace whose district is partly in two circuit court districts of the county may hold his court in either or both districts and will have entire jurisdiction of persons within his district, but appeals from his court to the circuit court must be to the circuit court of the district in which the suit is tried. Woods v. Speer, 127 Miss. 593, 90 So. 322, 1921 Miss. LEXIS 262 (Miss. 1921).

Where a justice of the peace has two regular places in his district and alternates in holding his terms of court on certain days at specific places, a writ of garnishment on judgment rendered at one place may be returnable to the next regular term of his court at said place, although a regular intervening term of court may be held at the other place. Edwards v. Kingston Lumber Co., 92 Miss. 598, 46 So. 69, 1908 Miss. LEXIS 207 (Miss. 1908).

Under the Constitution providing for the election in each county by districts of justices of the peace, it is not in the power of the legislature to give the mayor of a town jurisdiction of a justice as to that part of the justice's district outside the town. Heggie v. Stone, 70 Miss. 39, 12 So. 253, 1892 Miss. LEXIS 113 (Miss. 1892).

3. Process.

The 1960 amendment of this section [Code 1942, § 1806] does not limit the power of a justice of the peace to issue a search warrant outside his district. Curtis v. State, 247 Miss. 675, 158 So. 2d 693, 1963 Miss. LEXIS 342 (Miss. 1963).

A justice of the peace can take an affidavit and issue a search warrant while he is physically outside of his district. Curtis v. State, 247 Miss. 675, 158 So. 2d 693, 1963 Miss. LEXIS 342 (Miss. 1963).

Issuance of a search warrant by a justice of the peace of one district of the county from another justice of the peace district of the county did not make the search warrant and subsequent conviction of unlawful possession of intoxicating liquor void, since such issuance of the search warrant was not a judicial act and was authorized by this section [Code 1942, § 1806]. McGowan v. State, 189 Miss. 450, 196 So. 222, 1940 Miss. LEXIS 103 (Miss. 1940).

A justice of the peace in one district of the county may issue warrant returnable before a justice of the peace of another district. Goffredo v. State, 145 Miss. 66, 111 So. 131, 1927 Miss. LEXIS 141 (Miss. 1927).

4. Freeholders or householders determined.

Term "freeholder" within statute governing venue in actions triable before justice of peace refers to property. Buckley v. Porter, 160 Miss. 98, 133 So. 215, 1931 Miss. LEXIS 149 (Miss. 1931).

Term "householder" within statute governing venue in actions triable before justice of peace refers to civil status of litigant and not to property. Buckley v. Porter, 160 Miss. 98, 133 So. 215, 1931 Miss. LEXIS 149 (Miss. 1931).

Term "resides" within statute governing venue in actions triable before justice of peace means where person has settled abode for time. Buckley v. Porter, 160 Miss. 98, 133 So. 215, 1931 Miss. LEXIS 149 (Miss. 1931).

Mother who with child rented land in L. county and made crop thereon held "householder" "residing" in such county within statute governing venue in justice court actions. Buckley v. Porter, 160 Miss. 98, 133 So. 215, 1931 Miss. LEXIS 149 (Miss. 1931).

5. Venue.

6. —District of defendant's residence.

Where householder resides out of district of justice of peace before whom suit is brought, both justice and circuit court on appeal are without jurisdiction. Buckley v. Porter, 160 Miss. 98, 133 So. 215, 1931 Miss. LEXIS 149 (Miss. 1931).

A debt contracted in the district in which a defendant lives and having a justice of the peace qualified to act therein must be sued upon in the district of his residence. Molpus v. Bostic Lumber & Mfg. Co., 110 Miss. 883, 71 So. 16, 1916 Miss. LEXIS 223 (Miss. 1916).

A defendant freeholder or householder must be sued in the county of his residence regardless of where the debt was contracted. Gibson v. Mills, 95 Miss. 726, 49 So. 568, 1909 Miss. LEXIS 279 (Miss. 1909).

To revive a judgment before a justice of the peace the suit must be brought for under $200.00 in the district of the residence of the defendant who lives in another county. Smith v. Eubank, 89 Miss. 838, 43 So. 81, 1906 Miss. LEXIS 96 (Miss. 1906).

An action on a justice's judgment is properly brought in the district in which the defendant resides rather than in the district in which the original judgment was procured. Wise v. Keer Thread Co., 84 Miss. 200, 36 So. 244, 1904 Miss. LEXIS 25 (Miss. 1904).

A suit upon a judgment rendered by a justice of the peace is properly brought before a justice of the district of defendant's residence, although it was rendered by a justice of a different district. Wise v. Keer Thread Co., 84 Miss. 200, 36 So. 244, 1904 Miss. LEXIS 25 (Miss. 1904).

A justice is without jurisdiction of a suit on a debt contracted in another justice's district of the county by a sole defendant who there resides and is a householder or freeholder of the county, there being in such other district a magistrate qualified to try the cause. Hilliard v. Chew, 76 Miss. 763, 25 So. 489, 1899 Miss. LEXIS 7 (Miss. 1899), overruled, Catlett v. Drummond, 113 Miss. 450, 74 So. 323, 1917 Miss. LEXIS 120 (Miss. 1917).

A justice of the peace of a district other than the one where the defendant, a freeholder or householder, resides and other than the one where the property is found, has no jurisdiction of a replevin suit. Turner v. Lilly, 56 Miss. 576, 1879 Miss. LEXIS 168 (Miss. 1879).

A justice of the peace has no jurisdiction of a suit alone against a freeholder or householder of another county. Cain v. Simpson, 53 Miss. 521, 1876 Miss. LEXIS 107 (Miss. 1876).

7. —Where contract made or liability incurred.

A justice of the peace of the justice district of the county where contract is made, or liability incurred, may render judgment in suit thereon, although the defendant is a freeholder and householder of another justice district of the county and pleads to the jurisdiction. Johnson v. Porter, 143 Miss. 652, 109 So. 601, 1926 Miss. LEXIS 303 (Miss. 1926).

A justice of the peace has jurisdiction of suits in tort occurring in his district even if defendant is a freeholder and householder of another justice of the peace district which has a competent justice to try cause. Harper v. Adams, 141 Miss. 806, 106 So. 354, 1925 Miss. LEXIS 222 (Miss. 1925).

A debt contracted in the district in which a defendant lives and having a justice of the peace qualified to act therein must be sued upon in the district of his residence. Molpus v. Bostic Lumber & Mfg. Co., 110 Miss. 883, 71 So. 16, 1916 Miss. LEXIS 223 (Miss. 1916).

A nonresident executor appointed by the chancery court of a county in this state may be sued in a justice's court of another county if the contract sued upon was made in the justice's district in which the suit is brought and he be there personally served with process. Williams v. Stewart, 79 Miss. 46, 30 So. 1, 1901 Miss. LEXIS 27 (Miss. 1901).

A justice is without jurisdiction of a suit on a debt contract in another justice's district of the county by a sole defendant who there resides and is a householder or freeholder of the county, there being in such other district a magistrate qualified to try the cause. Hilliard v. Chew, 76 Miss. 763, 25 So. 489, 1899 Miss. LEXIS 7 (Miss. 1899), overruled, Catlett v. Drummond, 113 Miss. 450, 74 So. 323, 1917 Miss. LEXIS 120 (Miss. 1917).

8. —Situs of property.

An action to enforce a mechanic's lien upon an automobile is an action in rem and may be brought in the jurisdiction in which the auto is found. West Point Motor Car Co. v. McGhee, 122 Miss. 604, 84 So. 690, 1920 Miss. LEXIS 458 (Miss. 1920).

Replevin can be brought in a county where the goods are found, even if the defendant be a freeholder resident of another county. Ellison v. Lewis, 57 Miss. 588, 1880 Miss. LEXIS 6 (Miss. 1880).

A justice of the peace of a district other than the one where the defendant, a freeholder or householder, resides and other than the one where the property is found, has no jurisdiction of a replevin suit. Turner v. Lilly, 56 Miss. 576, 1879 Miss. LEXIS 168 (Miss. 1879).

9. —Actions against nonresidents.

Action against a nonresident of the state may be brought in any justice of the peace district in which he may be found. McDonough v. Stringer, 155 Miss. 179, 124 So. 334, 1929 Miss. LEXIS 280 (Miss. 1929).

A justice has jurisdiction to issue the writ and try the cause in an attachment suit against a nonresident, although the only property attached is in another district of the county, and this, too, where there is a qualified and acting justice in such other district. Griggs v. Jesse French Piano & Organ Co., 70 Miss. 211, 14 So. 24, 1892 Miss. LEXIS 143 (Miss. 1892).

10. Transfer of actions.

When on appeal from a justice's court the case is reversed for want of jurisdiction and papers are sent back and transferred to a justice having jurisdiction, the claimant of goods attached for rent is not entitled to be notified of the transfer. Pierce v. Watkins, 74 Miss. 394, 21 So. 148, 1896 Miss. LEXIS 155 (Miss. 1896).

If a freeholder or householder be sued out of the proper district, the justice is without power to transfer the cause. He must dismiss it. Cain v. Simpson, 53 Miss. 521, 1876 Miss. LEXIS 107 (Miss. 1876).

11. —Disqualification of justice.

Objection to disqualification of judge must be made before such judge loses control over his judgment by adjournment. Dixon v. Rowland, 143 Miss. 270, 108 So. 807, 1926 Miss. LEXIS 264 (Miss. 1926).

Objection to disqualification of judge because of interest or relationship to party can be availed of only by objection made on that ground. Qualification of a justice of the peace, presiding in liquor prosecution, cannot be attacked collaterally in habeas corpus proceedings. Dixon v. Rowland, 143 Miss. 270, 108 So. 807, 1926 Miss. LEXIS 264 (Miss. 1926).

A party to a suit before a disqualified justice, who has consented to call another justice to sit in his place, thereby getting substantially the benefit of a transfer to another justice, cannot thereafter complain of want of jurisdiction in the justice called in. Cross v. Levy, 57 Miss. 634, 1880 Miss. LEXIS 24 (Miss. 1880).

12. Waiver.

The failure of the defendant to object to jurisdiction at the proper time is a waiver to the right. Stanley v. Cruise, 134 Miss. 542, 99 So. 376, 1924 Miss. LEXIS 304 (Miss. 1924).

The right to be sued in the district of residence may be waived by a defendant by his failure to appear and plead the facts. Catlett v. Drummond, 113 Miss. 450, 74 So. 323, 1917 Miss. LEXIS 120 (Miss. 1917).

OPINIONS OF THE ATTORNEY GENERAL

An individual may be instructed prior to filing an action that the county justice court might lack proper jurisdiction, but if the plaintiff still persists in filing the action in that court, the clerk should file the action and collect the proper fees; the justice court judge may, prior to issuing a summons, order the case dismissed for lack of jurisdiction and, in such a case, the plaintiff would not be entitled to his filing fee but would be entitled to refund of the constable's fee. Shirley, Nov. 16, 2001, A.G. Op. #01-0697.

RESEARCH REFERENCES

ALR.

Disqualification of judge for bias against counsel for litigant. 54 A.L.R.5th 575.

Am. Jur.
47 Am. Jur. 2d, Justices of the Peace § 8.

CJS.
51 C.J.S., Justices of the Peace § 46.

§ 11-9-103. If two or more defendants, where brought.

In suits or proceedings against two (2) or more defendants, jointly or jointly and severally liable, it shall be lawful to bring the suit in the justice court of the county wherein either of the defendants reside or where the cause of action arose; and such justice court shall have power to issue a summons or other process to bring in all codefendants from any other county.

HISTORY: Codes, 1871, § 1320; 1880, § 2192; 1892, § 2396; 1906, § 2725; Hemingway's 1917, § 2224; 1930, § 2073; 1942, § 1807; Laws, 1981, ch. 471, § 24; Laws, 1982, ch. 423, § 28; Laws, 1992, ch. 389 § 2, eff from and after passage (approved April 27, 1992).

Cross References — Venue of actions, generally, see § 11-11-1 et seq.

JUDICIAL DECISIONS

1. In general.
County must be sued in court having jurisdiction of amount sitting at county site, though another person is named as joint defendant. Simpson v. Neshoba County, 157 Miss. 217, 127 So. 692, 1930 Miss. LEXIS 267 (Miss. 1930).

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur. 2d, Justices of the Peace § 8.

CJS.
51 C.J.S., Justices of the Peace § 46.

§ 11-9-105. How suit begun in civil cases.

Anyone desiring to sue in the justice court shall lodge with the clerk of the justice court the evidence of debt, statement of account, or other written statement of the cause of action. The clerk shall record all filings and shall, as far as practicable, assign the cases to each justice court judge in the county on a rotating basis to insure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business. The clerk shall issue a summons for the defendant, returnable to the next term of the court of the justice court judge to which the case is assigned, which shall be executed five (5) days before the return day; but if the process be executed less than five (5) days before the return day, the service shall be good to require the appearance of the defendant at the term next succeeding the one to which it is returnable. Any summons issued within five (5) days before a term of the court shall be made returnable to the next succeeding term, unless a shorter day be named, in pursuance of the provision for a trial without delay in the case of nonresident or transient defendants. When the case has been recorded and assigned and process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

HISTORY: Code, Hutchinson's 1848, ch. 50, art. 2 (9); 1857, ch. 58, arts. 7, 10; 1871, §§ 1305, 1310; 1880, §§ 2196, 2197; 1892, § 2401; 1906, § 2730; Hemingway's 1917, § 2229; 1930, § 2078; 1942, § 1812; Laws, 1981, ch. 471, § 13; Laws, 1982, ch. 423, § 10; Laws, 1991, ch. 551, § 1, eff from and after October 1, 1991.

Cross References — Prepayment of court costs as prerequisite to civil jurisdiction of justice of peace court, see § 9-11-10.

Trial out of term for nonresident or transient defendant in justice court, see § 9-11-15.

Assignment of cases by justice court clerk in manner provided by this section, see § 9-11-27.

Statute of limitations for actions brought on open accounts or unwritten contracts, see §§ 15-1-29, 15-1-31.

Commencement of action, see Rule 2.06, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Filing cause of action.
3. Process.
4. Evidence, admissibility of.

1. In general.

Statement of account showing name of defendant, amount of claim for rent, and period covered, held to give justice jurisdiction. Oxford Spotless Cleaners v. Mayfield, 157 Miss. 565, 128 So. 567, 1930 Miss. LEXIS 328 (Miss. 1930).

Proceedings in justices' courts are treated with great indulgence, the substance and not the form thereof is to be considered. A. B. Smith Co. v. Jones, 75 Miss. 325, 22 So. 802, 1897 Miss. LEXIS 108 (Miss. 1897).

2. Filing cause of action.

The account, required by the statute to be filed with the declaration of the plaintiff, must state distinctly the several items of his claim against the defendant, and the particular date of the item is a necessary part of that distinctness of item which the statute requires. Griffith v. Goodin, 202 Miss. 548, 32 So. 2d 743, 1947 Miss. LEXIS 315 (Miss. 1947).

Failure of plaintiff in action to enforce a purchase money lien before a justice of the peace to attach the contract and note evidencing the transaction did not make the statement of the cause of action void where the affidavit for the writ of seizure clearly set out the cause of action, and it was not error in the circuit court on appeal to permit the plaintiff to attach them. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337, 1936 Miss. LEXIS 277 (Miss. 1936).

Written statement in declaration filed in justice court as to railroad's blocking switch, preventing loading logs, stated cause of action. Mississippi C. R. Co. v. May, 149 Miss. 334, 115 So. 561, 1928 Miss. LEXIS 45 (Miss. 1928).

Where the cause of action consists of a contract to pay rent which is filed with a statement that $200.00 has been claimed thereon is sufficient for jurisdictional purpose. Town v. H. Lupkin & Son, 114 Miss. 693, 75 So. 546, 1917 Miss. LEXIS 80 (Miss. 1917).

The original contract or cause of action is not required to be filed, but a copy will suffice. Town v. H. Lupkin & Son, 114 Miss. 693, 75 So. 546, 1917 Miss. LEXIS 80 (Miss. 1917).

The cause of action or a copy thereof should be "lodged" with the justice of the peace. Town v. H. Lupkin & Son, 114 Miss. 693, 75 So. 546, 1917 Miss. LEXIS 80 (Miss. 1917).

A mere affidavit that defendant "is justly indebted in the sum of $160" to plaintiff, filed in a justice court, does not comply with this section [Code 1942, § 1812], requiring the filing of evidence of debt, statement of account, or other written statement of the cause of action. Greenburg v. Massey, 90 Miss. 121, 43 So. 1, 1907 Miss. LEXIS 35 (Miss. 1907).

It is sufficient to file a copy of a promissory note with the justice. Duncan v. Board of Supervisors, 64 Miss. 38, 8 So. 204, 1886 Miss. LEXIS 11 (Miss. 1886).

3. Process.

Summons issued and returnable to a special day and not to the regular term of justice court is not void but merely irregular; and where justice continued the cause to a date in the regular term, party summoned for such special day, having failed to appear on either day, was subject to default judgment. McCormick Motor Car Co. v. McDonald, 153 Miss. 409, 121 So. 121, 1929 Miss. LEXIS 40 (Miss. 1929).

Judgment in justice of peace court, pursuant to summons returnable to past date, held of no effect. Howell v. Kersh, 152 Miss. 266, 119 So. 186, 1928 Miss. LEXIS 254 (Miss. 1928).

A justice may authorize another to subscribe his name to a summons in his presence. Gooch v. Glidewell, 124 Miss. 16, 86 So. 705, 1920 Miss. LEXIS 490 (Miss. 1920).

No valid judgment can be rendered without valid service of process or an appearance or waiver of process. Boutwell v. Grayson, 118 Miss. 80, 79 So. 61, 1918 Miss. LEXIS 54 (Miss. 1918), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

A constable cannot serve process outside of his district. Boutwell v. Grayson, 118 Miss. 80, 79 So. 61, 1918 Miss. LEXIS 54 (Miss. 1918), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

Each defendant to a judgment must be served with process to make the judgment valid as to all. Carrollton Hardware & Implement Co. v. Marshall, 117 Miss. 224, 78 So. 7, 1918 Miss. LEXIS 166 (Miss. 1918), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

An action is begun when summons is issued and does not relate back to time of filing cause of action where summons is delayed by plaintiff's instruction. Stewart v. Petitt, 94 Miss. 769, 48 So. 5, 1909 Miss. LEXIS 334 (Miss. 1909).

A judgment of a justice in a civil case against two or more defendants is an entirety and being void as to one is void to all. Comenitz v. Bank of Commerce, 85 Miss. 662, 38 So. 35, 1904 Miss. LEXIS 178 (Miss. 1904), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922); Boutwell v. Grayson, 118 Miss. 80, 79 So. 61, 1918 Miss. LEXIS 54 (Miss. 1918), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

A judgment of a justice in a civil case against a defendant not a nonresident or transient person upon less than five days' service of process is void. Comenitz v. Bank of Commerce, 85 Miss. 662, 38 So. 35, 1904 Miss. LEXIS 178 (Miss. 1904), overruled, Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

Service of a summons by a justice who issued it is void and does not confer jurisdiction over the person of the defendant. Code 1892, § 3445 [Code 1906, § 3944], authorizing the service of process in certain cases by justices of the peace does not empower a justice to serve a summons issued by himself. McDugle v. Filmer, 79 Miss. 53, 29 So. 996, 1901 Miss. LEXIS 24 (Miss. 1901).

4. Evidence, admissibility of.

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held not admissible in circuit court. Anthony v. Bassett, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

Where defendant did not, by sworn plea, deny execution of written instrument, referred to in plaintiff's statement of cause of action and made a part thereof as contemplated by this section [Code 1942, § 1812], evidence he did not execute instrument held improperly admitted. Farad Co. v. Buckalew, 155 Miss. 194, 124 So. 333, 1929 Miss. LEXIS 279 (Miss. 1929).

Admitting copy of administrator's bond in suit to enforce claim against estate after its approval held error, where copy of bond was not annexed to or filed with declaration. Lawson v. Dean, 144 Miss. 309, 109 So. 801, 1926 Miss. LEXIS 361 (Miss. 1926).

OPINIONS OF THE ATTORNEY GENERAL

All cases, civil and criminal, shall be assigned by the clerk to justice court judges of county in manner provided in Miss. Code Section 11-9-105. Ferguson, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 provides that it is duty of justice court clerk to record all civil suits and to assign them on rotating basis to justice court judges; this section also requires clerk to issue summons for particular defendant; it also requires clerk to record and assign and issue process on any civil case and thereafter "within two (2) working days, forward certified copies of documents pertaining to the case to the justice court judge to which the case is assigned for further processing." Ferguson, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 states that, in civil suits, justice court clerk shall record all filings. Ferguson, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 requires justice court clerk to assign cases to judges on a rotation basis; however, as for setting docket, judges have discretion as to cases assigned ; judges may establish procedure whereby clerk sets docket. Ferguson, June 9, 1993, A.G. Op. #93-0331.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace §§ 16- 20.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 22 (Summons compelling appearance before justice of the peace).

CJS.

51 C.J.S., Justices of the Peace §§ 123-144.

§ 11-9-107. Service of process by sheriff or constable.

When any process has not been returned by a constable within ten (10) working days after issuance by the clerk of the justice court, the clerk shall direct the sheriff of his county and his deputies to execute any such process of the justice court; and the sheriff and his deputies shall execute any process so directed to him by any clerk of the justice court.

HISTORY: Codes, 1857, ch. 58, art. 11; 1871, § 1311; 1880, § 2198; 1892, § 2402; 1906, § 2731; Hemingway's 1917, § 2230; 1930, § 2079; 1942, § 1813; Laws, 1981, ch. 471, § 25; Laws, 1982, ch. 423, § 28; Laws, 1995, ch. 464, § 2, eff from and after October 1, 1995.

Cross References — Payment to county chancery clerk of fees collected for serving process or writ issued in different county, see § 9-11-20.

Duties of constables, generally, see §§ 19-19-5, 19-19-7.
Duty of sheriff to execute and return process, see § 19-25-37.
Service of summons, see Rule 2.08, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

1. In general.

The record must affirmatively show that the person authorized to execute the summons executed it. Postal Telegraph-Cable Co. v. Thompson, 121 Miss. 379, 83 So. 612, 1919 Miss. LEXIS 172 (Miss. 1919).

A city marshal who is ex-officio constable may serve process within the city limits and the presumption is in favor of its validity. Gulf & S. I. R. Co. v. Ramsey, 98 Miss. 863, 54 So. 440, 1910 Miss. LEXIS 135 (Miss. 1910).

Under the Constitution the jurisdiction of justices of the peace and the executive power of constables is limited to the districts for which they are elected. Riley v. James, 73 Miss. 1, 18 So. 930, 1895 Miss. LEXIS 117 (Miss. 1895).

OPINIONS OF THE ATTORNEY GENERAL

The law requires a justice of the peace to issue his process and direct same to the constable of the district, if there be one duly qualified to act, unless the constable has some interest in the matter in litigation, and in that event the justice of the peace should endorse his reasons on the process for directing it to someone else. Ops. Atty. Gen., 1931-33, p. 144.

This section safeguards against an impossibility on the part of a justice of the peace to obtain service of process, and a justice of the peace does not have authority to appoint a deputy constable for that purpose. Ops. Atty. Gen., 1965-67, p. 122.

Section 11-9-107 directs the justice court clerk to issue process to a constable and if the process has not been returned to the clerk within ten working days, to issue that process to the sheriff's office to be served or executed. McKee, December 13, 1995, A.G. Op. #95-0825.

In the case where a criminal defendant has been found guilty and assessed a fine in justice court and has failed to make payment on the fine as agreed and a contempt warrant has been issued, under Section 11-9-107 all such process should be issued to a constable. If the constable does not make a return within ten days, then the process should be issued to the sheriff for service. Coleman, January 26, 1996, A.G. Op. #96-0011.

Based on Section 11-9-107, a constable must accept all warrants issued to him from the justice court clerk and make a reasonable, good faith effort to serve them. However, if the warrant has not been returned to the clerk within ten working days after issuance to the constable, the clerk must send the warrant to the sheriff's office to be served by the sheriff or his deputies. The sheriff may not decline to accept such a warrant. Lambert, August 23, 1996, A.G. Op. #96-0577.

The duty of the clerk of the justice court to direct the sheriff of his county and his deputies to execute any process of the justice court that has not been returned by a constable within ten working days applies to civil process; a justice court is not required to issue criminal process, i.e., arrest warrants, to constables for a ten day period before directing such warrants to a sheriff's department. Allgood, January 23, 1998, A.G. Op. #98-0011.

There is no statutory provision allowing for private process servers within the state of Mississippi other than in an emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. Huckaby, Aug. 25, 2006, A.G. Op. 06-0378.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 20.

62B Am. Jur. 2d, Process §§ 122, 127—129.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 23 (Summons compelling appearance before justice of the peace-directed to sheriff).

CJS.

51 C.J.S., Justices of the Peace § 123.

72 C.J.S., Process § 44.

§ 11-9-109. Person appointed to execute process.

In cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the clerk of the justice court may appoint some reputable person to execute any process, the clerk to be liable on his bond for all damage which may result to a party to the cause or other person from his appointment of an insolvent or incompetent person.

HISTORY: Codes, 1857, ch. 58, art. 11; 1871, § 1311; 1880, § 2199; 1892, § 2403; 1906, § 2732; Hemingway's 1917, § 2231; 1930, § 2080; 1942, § 1814; Laws, 1981, ch. 471, § 26; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Service of summons, see Rule 2.08, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

1. In general.

In case of special emergency a justice of the peace is authorized to appoint a private person to execute any process which the justice of the peace is authorized to issue whether such writ is returnable to his court or some other court. Gilbert v. Glenny, 135 Miss. 603, 99 So. 507, 1924 Miss. LEXIS 12 (Miss. 1924).

The appointment of a private person to serve a writ of attachment or garnishment in an emergency case is void where not in writing. Brown v. Williams-Brooke Co., 106 Miss. 187, 63 So. 351, 1913 Miss. LEXIS 121 (Miss. 1913).

The presumption of legality as to the authority of a person to serve a writ of summons prevails. Alfred v. Batson, 91 Miss. 749, 45 So. 465, 1907 Miss. LEXIS 179 (Miss. 1907).

A justice cannot specially deputize a private person to execute a writ of attachment in another county, even in a case of emergency. Miller v. Edwards, 75 Miss. 739, 23 So. 426, 1898 Miss. LEXIS 19 (Miss. 1898); Barnett v. Ring, 55 Miss. 97, 1877 Miss. LEXIS 111 (Miss. 1877); Bates v. Crow, 57 Miss. 676, 1880 Miss. LEXIS 33 (Miss. 1880).

OPINIONS OF THE ATTORNEY GENERAL

Miss. Code Section 11-9-109, which states that "in cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the clerk of the justice court may appoint some reputable person to execute any process", by its own terms does not apply to papers served by deputy; in any case, there is no authority to pay individual appointed under this section to serve process. Wilkerson, Mar. 10, 1993, A.G. Op. #93-0120.

There is no statutory provision allowing for private process servers within the state of Mississippi other than in an emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. Huckaby, Aug. 25, 2006, A.G. Op. 06-0378.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 20.

62B Am. Jur. 2d, Process §§ 122, 127—129.

CJS.

72 C.J.S., Process §§ 45, 46.

§ 11-9-111. Property and process delivered to office.

Property seized in execution of any process by one appointed by the clerk of the justice court to execute it shall be immediately delivered, with the process, to the sheriff of the county; and the person from whom the property was taken shall be at once informed who has it. Such property shall be considered and dealt with as if it had been seized by the officer to whom it was delivered at the time of its delivery to him.

HISTORY: Codes, 1880, § 2200; 1892, § 2404; 1906, § 2733; Hemingway's 1917, § 2232; 1930, § 2081; 1942, § 1815; Laws, 1981, ch. 471, § 27; Laws, 1982, ch. 423, § 28; Laws, 1991, ch. 324, § 1, eff from and after July 1, 1991.

Cross References — Levy on personal property, see § 13-3-125.

JUDICIAL DECISIONS

1. In general.

A return on a writ of replevin by a person appointed by a justice of the peace is void and the court has no jurisdiction unless the defendant appears, but upon his appearance and motion to quash the writ the court has jurisdiction of him. Gilbert v. Glenny, 135 Miss. 603, 99 So. 507, 1924 Miss. LEXIS 12 (Miss. 1924).

Although one specially deputized to execute process is required to deliver the same together with the property seized to the sheriff or constable, a claimant who gives bond and obtains from such person property levied upon by him, is estopped to take advantage of the irregularity. Spears v. Robinson, 71 Miss. 774, 15 So. 111, 1894 Miss. LEXIS 48 (Miss. 1894); State ex rel. Harland v. Depeder, 65 Miss. 26, 3 So. 80, 1887 Miss. LEXIS 8 (Miss. 1887).

§ 11-9-113. Process returned by sheriff or constable.

The process so delivered to the sheriff or constable shall be returned by him to the clerk of the justice court, according to its command.

HISTORY: Codes, 1880, § 2201; 1892, § 2405; 1906, § 2734; Hemingway's 1917, § 2233; 1930, § 2082; 1942, § 1816; Laws, 1981, ch. 471, § 28; Laws, 1982, ch. 423, § 15, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Payment to county chancery clerk of fees collected for serving process or writ issued in different county, see § 9-11-20.

Return of writ of attachment by sheriff when writ is served by one other than sheriff, see § 11-33-27.

Marking and return of process by sheriff, see § 13-3-37.

OPINIONS OF THE ATTORNEY GENERAL

It is the responsibility of the constable who served the summons to verify his service by making a return of such process as specified by the statute; the constable should sign the return verifying that such process was served by him. Hemphill, December 18, 1998, A.G. Op. #98-0746.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 20.

62B Am. Jur. 2d, Process §§ 250 et seq.

CJS.

51 C.J.S., Justices of the Peace §§ 136-138.

72 C.J.S., Process §§ 150–152 et seq.

§ 11-9-115. Witnesses to be subpoenaed.

The justice court judge before whom any cause is pending shall direct the clerk of the justice court to issue all subpoenas for witnesses which either of the parties may require, and such subpoenas shall be returnable on a day certain, giving reasonable time for attendance. If any witness, duly subpoenaed, shall fail to appear in pursuance of the subpoena, he shall forfeit the sum of ten dollars ($10,00), for the use of the party in whose behalf he was subpoenaed, for which the justice court judge may enter judgment nisi, which shall be made final in case the witness, on being duly subpoenaed to appear and show cause, shall fail to appear and show cause for such default. The justice court may issue an attachment for such witness, as a circuit court may do in like case.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (13); 1857, ch. 58, art. 16; 1871, § 1313; 1880, § 2202; 1892, § 2406; 1906, § 2735; Hemingway's 1917, § 2234; 1930, § 2083; 1942, § 1817; Laws, 1981, ch. 471, § 29; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Subpoenas for witnesses in civil cases generally, see § 13-3-93 et seq.

Subpoenas for witnesses in criminal cases, see § 99-9-11 et seq.

Failure to obey subpoena, see Rule 2.10, Uniform Rules of Procedure for Justice Court.

OPINIONS OF THE ATTORNEY GENERAL

Miss. Code Section 11-9-115 provides that justice court judge shall direct justice court clerk to issue all subpoenas for witnesses which either party may require. Ferguson, June 9, 1993, A.G. Op. #93-0331.

RESEARCH REFERENCES

CJS.

98 C.J.S., Witnesses §§ 20-22 et seq.

§ 11-9-117. Form of entry on default of witness.

The judgment nisi against a defaulting witness, may be in the following form, viz.:

"________ , being subpoenaed to appear this day as a witness for ________, the ________, in the case of ________ v. ________ , No. ________ , and having made default, judgment is given against said ________ , the defaulting witness, for ten dollars, in favor of ________ , to be made final unless said ________ , the witness, shall show cause against it according to law."

HISTORY: Codes, 1871, § 1313; 1880, § 2248; 1892, § 2407; 1906, § 2736; Hemingway's 1917, § 2235; 1930, § 2084; 1942, § 1818.

§ 11-9-119. Form of scire facias for witness.

The scire facias to be issued by the justice for a defaulting witness may be as follows, viz.:

"The State of Mississippi.

"To any lawful officer of ________ County:

"This is to command you to make known to ________ that a judgment in favor of ________ for ten dollars has been given against him by me, a justice of the peace of ________ County, for his default in not appearing before me, at ________ , on the ________ day of ________ A. D. ________ , to testify as a witness for ________ in the case of ________ against ________ , No. ________ as he has been subpoenaed to do; and unless, on the ________ day of ________ , A. D. ________ , before me at ________ , at ________ , o'clock, ________ , he shall show cause to the contrary, the said judgment will be made final; and have there then this writ.

"Witness my hand this the ________ day of ________ , A. D. ________ J.P."

HISTORY: Codes, 1880, § 2249; 1892, § 2408; 1906, § 2737; Hemingway's 1917, § 2236; 1930, § 2085; 1942, § 1819.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-9-121. Form of an attachment for a witness.

An attachment for a witness may be in the following form, viz.:

"The State of Mississippi.

"To any lawful officer of ________ County:

"We command you to take the body of ________ , and have him before the undersigned justice of the peace of ________ County, at ________ , on the ________ day of ________ , A. D. ________ at ________ o'clock ________ , to testify for the ________ in the case of ________ against ________ , No. ________ . (But if the said ________ shall furnish bail, with sureties, to be approved by you, in the sum of one hundred dollars, for his appearance at said time and place, you will discharge him.) And have there then this writ.

"Witness my hand, the ________ day of ________ , A. D. ________ "

The part in brackets should be omitted, if it be not intended that the witness shall be discharged on bail, but shall be brought before the court by the officer. An attachment and scire facias for a defaulting witness may be combined in one writ, and when the witness is before the justice of the peace in pursuance of such process, the judgment nisi shall be made final, if good cause to the contrary be not shown.

HISTORY: Codes, 1880, §§ 2250, 2251; 1892, § 2409; 1906, § 2738; Hemingway's 1917, § 2237; 1930, § 2086; 1942, § 1820.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Subpoenas for witnesses in civil cases generally, see § 13-3-93 et seq.

Attachment for subpoenaed witnesses who fail to appear in civil case, see § 13-3-103.

Subpoenas of witnesses in criminal cases, see § 99-9-11 et seq.

Attachment of witnesses failing to appear in criminal case, see § 99-9-19.

§ 11-9-123. Form of entry of judgment in such case.

The entry of final judgment in such case may be in the following form, viz.:

"________ being duly summoned to appear and show cause against the judgment nisi for ten dollars entered against him in favor of ________ , as a defaulting witness in the case of ________ v. ________ No. ________ on the ________ day of ________ A. D. ________ , and having failed to show cause for such default, the said judgment nisi for ten dollars is now made final, as well as judgment for costs in said matter, this the ________ day of ________ A. D. ________ ."

HISTORY: Codes, 1880, § 2252; 1892, § 2410; 1906, § 2739; Hemingway's 1917, § 2238; 1930, § 2087; 1942, § 1821.

§ 11-9-125. Setoff filed on return day before trial.

The defendant in any action shall, on or before the return day of the summons, and before the trial of the case, file with the justice court judge to whom the case is assigned the evidence of debt, statement of account, or other written statement of the claim, if any, which he may desire to and which lawfully may be set off against the demand of the plaintiff, and, in default thereof, he shall not be permitted to use it on the trial.

HISTORY: Codes, 1871, § 1306; 1880, § 2204; 1892, § 2411; 1906, § 2740; Hemingway's 1917, § 2239; 1930, § 2088; 1942, § 1822; Laws, 1981, ch. 471, § 30; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Availability of set-off.
3. —Mutuality.
4. —Jurisdictional amount.
5. —Assignments.
6. Time for filing.
7. Matters which may be set off.
8. Recoupment.
9. Pleading.
10. Evidence.

1. In general.

Where defendant filed no plea of setoff in action against him for rent in justice court, objection to his testimony as to work performed for plaintiff was properly sustained. Wright v. Thornton, 196 Miss. 395, 17 So. 2d 437, 1944 Miss. LEXIS 205 (Miss. 1944).

Where on appeal to the circuit court, defendant interposed plea of setoff and introduced evidence in support thereof without objection of plaintiff until motion for new trial was filed, plaintiff was presumed to have consented, or at least to have waived its objection, to the filing of the plea out of time. Wright v. Thornton, 196 Miss. 395, 17 So. 2d 437, 1944 Miss. LEXIS 205 (Miss. 1944).

The court is liberal in its allowance of counterclaims in cases of insolvency in order that only the true balance may be paid. Citizens' Bank of Greenville v. Kretschmar, 91 Miss. 608, 44 So. 930, 1907 Miss. LEXIS 163 (Miss. 1907).

2. Availability of set-off.

A claim acquired after institution of replevin suit cannot be availed of in the suit. McIntyre v. E.E. Forbes Piano Co., 100 Miss. 517, 56 So. 457, 1911 Miss. LEXIS 45 (Miss. 1911).

Setoff is not available in a suit for unliquidated damages. Burrus v. Gordon, 57 Miss. 93, 1879 Miss. LEXIS 20 (Miss. 1879), overruled, Clayton v. Clark, 74 Miss. 499, 21 So. 565, 22 So. 189, 1896 Miss. LEXIS 182 (Miss. 1896).

The statute does not authorize a setoff against the state. Raymond v. State, 54 Miss. 562, 1877 Miss. LEXIS 51 (Miss. 1877).

3. —Mutuality.

Debts cannot be shown to be mutual by evidence that one or more of the debtors are mere sureties. Peine v. Lewis, 64 Miss. 96, 8 So. 207, 1886 Miss. LEXIS 21 (Miss. 1886).

A setoff is in the nature of a cross action, and in a joint action by several plaintiffs their separate debts to the defendant cannot be set off against their joint demand. Walter Denny & Co. v. Wm. D. Wheelwright & Co., 60 Miss. 733, 1883 Miss. LEXIS 5 (Miss. 1883).

A demand against one person cannot be set off against him and his nominal partner in a suit by them on a note made to the firm. A setoff must be against all the plaintiffs. Jones v. Howard, 53 Miss. 707, 1876 Miss. LEXIS 139 (Miss. 1876).

If the action be by more than one plaintiff, and it is proposed to set off a debt of one plaintiff to the defendant; or if the action be against more than one defendant, and the proposed setoff be in favor of but one of them, there will be a want of mutuality; but if the setoff be in favor of all of the defendants and against all the plaintiffs and another person, and the debt be the several debt of each, it will be good. That another party also owes the debt does not destroy its several character or destroy mutuality. Moody v. Willis, 41 Miss. 347, 1867 Miss. LEXIS 5 (Miss. 1867); Peyton v. Planters' Compress Co., 63 Miss. 410, 1886 Miss. LEXIS 113 (Miss. 1886).

4. —Jurisdictional amount.

The defendant may prove a setoff greater in amount than the jurisdiction of the justice, if the balance, after deducting the amount of the plaintiff's demand, does not exceed his jurisdiction. Glass v. Moss, 2 Miss. 519, 1837 Miss. LEXIS 9 (Miss. 1837).

5. —Assignments.

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. Graham v. Stewart, 152 Miss. 307, 120 So. 171, 1929 Miss. LEXIS 204 (Miss. 1929).

Assignee of account could not, after defendant in action thereon filed setoff, be substituted as plaintiff over objection. Graham v. Stewart, 152 Miss. 307, 120 So. 171, 1929 Miss. LEXIS 204 (Miss. 1929).

An instance in an anti-commercial statute where a railroad company which purchased lumber from a party indebted to it for freight advances may set off its claim after seller's bankruptcy against the bank as assignee of the invoices. Illinois C. R. Co. v. First Nat'l Bank, 110 Miss. 676, 70 So. 831, 1915 Miss. LEXIS 102 (Miss. 1915).

An open account transferred by delivery may be so used. Ashby v. Carr, 40 Miss. 64, 1866 Miss. LEXIS 50 (Miss. 1866).

A setoff cannot be interposed by the maker of a note which has been assigned unless the setoff existed at the time of the notice of the assignment. Northern Bank of Mississippi v. Kyle, 8 Miss. 360, 1843 Miss. LEXIS 100 (Miss. 1843).

It is not necessary that an assignment should appear on a transferred note to enable the holder to use it as a setoff. Glass v. Moss, 2 Miss. 519, 1837 Miss. LEXIS 9 (Miss. 1837).

6. Time for filing.

In suit on itemized account, defendant's denial of correctness of specific charge and credit items held counter-affidavit, not setoff; hence could be first filed in circuit court on appeal from justice's court. McClain v. Henson, 169 Miss. 857, 153 So. 791, 1934 Miss. LEXIS 70 (Miss. 1934).

A defense and cross action of setoff in a suit before a justice of the peace must be filed on or before return day of summons and before trial. Richardson Corp. v. Standard Drug Co., 141 Miss. 92, 106 So. 95, 1925 Miss. LEXIS 211 (Miss. 1925).

7. Matters which may be set off.

An instance in which one bank may have its claim set off against another, see Citizens' Bank of Greenville v. Kretschmar, 91 Miss. 608, 44 So. 930, 1907 Miss. LEXIS 163 (Miss. 1907).

In an action for the price of a carload of meal, defendant may assert as a setoff a claim he has against plaintiff because of inferior quality in corn and oats formerly purchased from plaintiff and paid for. Wilkinson v. Searls, 70 Miss. 392, 13 So. 470, 1892 Miss. LEXIS 141 (Miss. 1892); Miller v. American Nat'l Bank, 76 Miss. 84, 23 So. 439, 1898 Miss. LEXIS 58 (Miss. 1898).

A bank may apply the amount to the credit of a depositor to a debt due to it by him jointly with another. Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615, 1889 Miss. LEXIS 6 (Miss. 1889).

In an action by a clerk against a storekeeper for the value of his services, the employer cannot set off a demand for money lost from the cash-drawer owing to the clerk's negligence. Cobb v. Wilson, Lees & Co., 60 Miss. 343, 1882 Miss. LEXIS 59 (Miss. 1882).

In an action of assumpsit, the defendant, having a claim as beneficiary under a deed of trust for the value of property converted and sold by the plaintiff, may set off the same against the plaintiff's demand. Hunt & Vaughan v. Shackleford, 55 Miss. 94, 1877 Miss. LEXIS 110 (Miss. 1877).

An unliquidated claim for damages cannot be used as a setoff. Casper v. Thigpen, 48 Miss. 635, 1873 Miss. LEXIS 85 (Miss. 1873).

8. Recoupment.

This section [Code 1942, § 1822] does not apply to the interposition of a claim in recoupment. Criss v. Bailey, 243 Miss. 130, 137 So. 2d 160, 1962 Miss. LEXIS 324 (Miss. 1962).

Recoupment is purely defensive and no judgment for an amount over can be recovered in favor of defendant. Hoover Commercial Co. v. Humphrey, 107 Miss. 810, 66 So. 214, 1914 Miss. LEXIS 147 (Miss. 1914).

If plaintiff's claim for damages is denied the plea of recoupment therein cannot be allowed. Hoover Commercial Co. v. Humphrey, 107 Miss. 810, 66 So. 214, 1914 Miss. LEXIS 147 (Miss. 1914).

This section [Code 1942, § 1822] has no application to a claim interposed in recoupment. Recoupment may be interposed for the first time on appeal to the circuit court. Amory Independent Tel. Co. v. Cox, 103 Miss. 541, 60 So. 641, 1912 Miss. LEXIS 196 (Miss. 1912).

Distinguishing "recoupment" from "setoff." Hayes v. Slidell Liquor Co., 99 Miss. 583, 55 So. 356, 1911 Miss. LEXIS 228 (Miss. 1911).

A suit brought for the purchase-money of machinery and a plea of setoff for unliquidated damages is filed and on such plea only matters in recoupment are considered, thus treating the plea as one in recoupment is not reversible error. W. T. Adams Mach. Co. v. Thomas, 87 Miss. 391, 39 So. 810, 1905 Miss. LEXIS 103 (Miss. 1905).

In a suit by a grantor for the purchase-money of land conveyed by general warranty, the grantee may recoup damages sustained by reason of expenses incurred by him in getting possession of the land, but is not entitled to credit for the costs of store fixtures purchased by him from the occupant to induce a surrender of the premises. Weatherbee Bros. v. Lillybeck, 86 Miss. 156, 38 So. 284, 1905 Miss. LEXIS 20 (Miss. 1905).

Recoupment is contradistinguished from setoff in three essential particulars: (1) It being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; (2) in having no regard to whether or not such matter be liquidated or unliquidated;

(3) that the judgment is not regulated by statute. Myers v. Estell, 47 Miss. 4, 1872 Miss. LEXIS 47 (Miss. 1872).

9. Pleading.

Written pleadings in a justice of peace court are not mandatory except where setoff is involved in the defense. National Hardwood Lumber Ass'n v. Gilmore-Puckett Lumber Co., 210 Miss. 354, 49 So. 2d 689, 1951 Miss. LEXIS 270 (Miss. 1951).

In a suit by a county a plea of setoff is bad which does not show that the claim sought to be set off has been presented to the board of supervisors and rejected. Board of Supervisors v. Brookhaven, 51 Miss. 68, 1875 Miss. LEXIS 13 (Miss. 1875); State use of Noxubee County v. Banks, 66 Miss. 431, 6 So. 184, 1889 Miss. LEXIS 122 (Miss. 1889).

Under a plea of payment a bill of particulars is necessary to enable defendant to avail himself of a setoff. Vanzant v. Shelton, 40 Miss. 332, 1866 Miss. LEXIS 74 (Miss. 1866).

10. Evidence.

Testimony of defendant in action in justice court against him for rent of apartment, that plaintiff was indebted to him for work performed was properly rejected in the absence of compliance with the requirements of this section [Code 1942, § 1822]. Wright v. Thornton, 196 Miss. 395, 17 So. 2d 437, 1944 Miss. LEXIS 205 (Miss. 1944).

If defendant pleads as a setoff and testifies to a contract and services thereunder, plaintiff may state in evidence his version of the contract, even though he makes out a contract under the statute of frauds. Timberlake v. Thayer, 76 Miss. 76, 23 So. 767, 1898 Miss. LEXIS 68 (Miss. 1898).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff §§ 97, 102.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Forms 31-33 (Filing of evidence for set off judgments).

CJS.

80 C.J.S., Setoff and Counterclaim §§ 100, 101.

§ 11-9-127. Trial and judgment; execution.

On the return day of the summons, unless continued, the justice court judge shall hear and determine the cause if both parties appear; give judgment by default if the defendant fails to appear and contest plaintiff's demand, or judgment of nonsuit against the plaintiff if he fails to appear and prosecute his claim; enter judgment in favor of the defendant where, in case of setoff, it shall appear that there is a balance due him, for the amount of such balance, and, when requested, issue execution against the goods and chattels, lands and tenements, of the party against whom judgment is rendered, for the amount of the judgment and costs, or costs alone, as the case may require, returnable to a day more than twenty (20) days after the rendition of the judgment, and not more than six (6) months after the issuance of the execution; and the execution may be directed to the proper officer of any county in this state.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (9); 1857, ch. 58, art. 7; 1871, § 1307; 1880, § 2205; 1892, § 2412; 1906, § 2741; Hemingway's 1917, § 2240; 1930, § 2089; 1942, § 1823; Laws, 1991, ch. 453, § 1, eff from and after July 1, 1991.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Taxation of costs in cases from justices of the peace, see § 11-53-71.

Arrangement of dates of court by justices and county prosecuting attorneys, see § 19-23-17.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Judgments.
3. Executions.

1. In general.

Debtors did not deny that they were all properly served with process and all failed to appear and defend the collection action, and pursuant to statutory law, the justice court was not in error in entering a default judgment, which included reasonable attorney fees, on the collection agency's collection actions against the debtors for unpaid medical bills. Franklin Collection Serv. v. Stewart, 863 So. 2d 925, 2003 Miss. LEXIS 870 (Miss. 2003).

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. Graham v. Stewart, 152 Miss. 307, 120 So. 171, 1929 Miss. LEXIS 204 (Miss. 1929).

A justice of the peace has no right to grant a new trial. An appeal from judgment by default must be perfected within ten days. Welch v. Hannie, 112 Miss. 79, 72 So. 861, 1916 Miss. LEXIS 69 (Miss. 1916).

Exclusion in the circuit court, on trial of claimant's issue, of the testimony of a justice of the peace, by whom judgment was rendered and execution issued on certain property, as to statements made by the defendant in execution and by the claimant was erroneous. Dalee Bros. v. Wigginton, 111 Miss. 749, 72 So. 149, 1916 Miss. LEXIS 383 (Miss. 1916).

2. Judgments.

A judgment rendered in the absence of defendant and of his counsel should be set aside where such absence was caused by their reliance on a statement made officially by the judge of the court that the case could not be reached, or would not be tried, before a certain date. Gardner v. Price, 199 Miss. 809, 25 So. 2d 459, 1946 Miss. LEXIS 249 (Miss. 1946).

Default judgment entered by justice of the peace on March 11, 1939, in violation of justice's assurance to defendants' counsel that the case would not be set for trial until March 25, 1939, which was after the adjournment of circuit court term, in accordance with custom existing among attorneys and magistrates in the county to continue cases coming up during circuit court's term until after adjournment thereof, was void. Gardner v. Price, 199 Miss. 809, 25 So. 2d 459, 1946 Miss. LEXIS 249 (Miss. 1946).

Judgment in justice court, reciting that defendant entered general appearance but declined to introduce evidence, sufficiently showed that issue was joined. Mississippi C. R. Co. v. May, 149 Miss. 334, 115 So. 561, 1928 Miss. LEXIS 45 (Miss. 1928).

A justice of the peace judgment on merits against plaintiff, though it should have been a judgment or nonsuit for failure to prosecute, held only erroneous, and not void and is available as res judicata. Childress v. Thomas Dry Goods Co., 145 Miss. 429, 110 So. 861, 1927 Miss. LEXIS 129 (Miss. 1927).

As to validity of judgment by default, see Welch v. Hannie, 112 Miss. 79, 72 So. 861, 1916 Miss. LEXIS 69 (Miss. 1916).

A judgment of a justice of the peace for plaintiff trying a case without a jury is a finding of plaintiff's right to recover and of his damages. Pharr Bros. & Jennings v. Yazoo & M. V. R. Co., 111 Miss. 830, 72 So. 240, 1916 Miss. LEXIS 405 (Miss. 1916).

Where a justice of the peace entered judgment for a sum greater than the amount of the judgment rendered and the defeated party took no steps against said error by appeal or proper motion at law he is not entitled to restrain collection thereof by an injunction. Gum Carbo Co. v. New Orleans German Gazette, 90 Miss. 177, 43 So. 82, 1907 Miss. LEXIS 42 (Miss. 1907).

For an example of a judgment of a justice of the peace questioned and held sufficient, see Swain v. Gilder, 61 Miss. 667, 1884 Miss. LEXIS 150 (Miss. 1884).

3. Executions.

Since execution is required to be returned to the justice of the peace rendering judgment, a justice of the peace cannot be a purchaser at the execution sale under his own judgment. E. E. Forbes Piano Co. v. Hennington, 98 Miss. 51, 53 So. 777, 1910 Miss. LEXIS 70 (Miss. 1910).

An execution issued to the sheriff of another county by the clerk of the circuit court on a duly enrolled judgment of a justice of his county, returnable before such justice, is void as also the seizure of defendant's property thereunder. Smith v. Mixon, 73 Miss. 581, 19 So. 295, 1895 Miss. LEXIS 161 (Miss. 1895).

OPINIONS OF THE ATTORNEY GENERAL

It is not necessary under Miss. Code Section 11-9-127 for justice court judgment to be enrolled on circuit clerk's judgment roll in order to effectuate garnishment or execution. Riggs, Feb. 18, 1993, A.G. Op. #93-0081.

Miss. Code Section 11-9-127 sets out duties of justice court judge as to court dates. Ferguson, June 9, 1993, A.G. Op. #93-0331.

Under Sections 11-9-127 and 13-3-133, to enforce the final judgment of the court is it legal to specify money on defendant's person and/or money in cash drawer of a business on the same execution. However, the sheriff may not conduct a search of a person or premises without a warrant from a court, but may seize any property that is in plain view. Aldridge, May 2, 1995, A.G. Op. #95-0156.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace §§ 34 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Forms 43-50 (Writ of execution).

CJS.

51 C.J.S., Justices of the Peace §§ 195 et seq.

§ 11-9-129. Judgment operates as a lien if enrolled.

Judgments rendered by justices of the peace shall operate as a lien upon the property, real or personal, of the defendant or defendants therein, found or situated in the county where rendered, or in any other county where the same may be, which is not exempt by law from execution, if an abstract of the judgment be filed with the clerk of the circuit court of the county wherein the property is situated, and entered upon the judgment roll, as in other cases of enrolled judgments. The lien shall commence from the date of enrollment, and the judgment may be enrolled and have the force and effect of a lien in all cases where an appeal is taken, as well as in other cases. And in the event of a reversal of the judgment of the justice's court, the clerk of the circuit court shall enter a memorandum to that effect on the judgment roll.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 10 (13); 1857, ch. 58, art. 20; 1871, § 1318; 1880, § 2206; 1892, § 2413; 1906, § 2742; Hemingway's 1917, § 2241; 1930, § 2090; 1942, § 1824.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Where sales under execution of justice's court may be made, see § 13-3-161.

JUDICIAL DECISIONS

1. In general.

Judgment rendered by a justice of the peace may be enrolled in the office of the clerk of the circuit court before the expiration of the five days allowed for the appeal. Minshew v. Geo. W. Davidson & Co., 86 Miss. 354, 38 So. 315, 1905 Miss. LEXIS 29 (Miss. 1905).

Judgments rendered by justices of the peace may be enrolled in any county in the state on filing an abstract of the judgment with the clerk of the circuit court. Wise v. Keer Thread Co., 84 Miss. 200, 36 So. 244, 1904 Miss. LEXIS 25 (Miss. 1904).

A judgment of a justice of the peace may be enrolled in any county upon compliance with this section [Code 1942, § 1824]. Wise v. Keer Thread Co., 84 Miss. 200, 36 So. 244, 1904 Miss. LEXIS 25 (Miss. 1904).

The plaintiff may have his judgment enrolled in the manner specified in any other county where property of the debtor may be situated, and have execution issued by the clerk of the circuit court of such county to an officer of that county, returnable into the justice's court by which the judgment is rendered. Smith v. Mixon, 73 Miss. 581, 19 So. 295, 1895 Miss. LEXIS 161 (Miss. 1895).

OPINIONS OF THE ATTORNEY GENERAL

Miss. Code Section 11-9-129 provides that judgment becomes lien against judgment debtor's property in county, if and when enrolled in circuit clerk's office. Riggs, Feb. 18, 1993, A.G. Op. #93-0081.

RESEARCH REFERENCES

ALR.

Necessity of notice of application or intention to correct error in judgment entry. 14 A.L.R.2d 224.

Am. Jur.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 41 (Affidavit of amount due-for judgment to act as lien on defendant's real estate).

CJS.

51 C.J.S., Justices of the Peace § 259.

§ 11-9-131. Execution not to be issued within ten days.

An execution shall not issue on any judgment of a justice of the peace until ten days after its rendition, unless the party recovering therein shall make and file an affidavit that he believes he will be in danger of losing his debt or demand by such delay, in which case execution shall issue immediately; but the opposite party shall not be deprived of his right of appeal within the time prescribed.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (17); 1857, ch. 58, art. 21; 1871, § 1317; 1880, § 2207; 1892, § 2414; 1906, § 2743; Hemingway's 1917, § 2242; 1930, § 2091; 1942, § 1825.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Executions in general, see § 13-3-113 et seq.

What is necessary to complete title to land sold under execution issued by justice of the peace, see § 13-3-189.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 1.

CJS.

51 C.J.S., Justices of the Peace § 271.

§ 11-9-133. Form of an execution.

An execution may be in the following form, viz.:

"The State of Mississippi.

"To any lawful officer of ________ county:

"We command you that of the real and personal estate of ________ you cause to be made ________ dollars, adjudged by the undersigned, justice of the peace of the county of ________ in said state, on the ________ day of ________ A. D. ________ , to ________ , also interest at ________ per centum on said sum until you shall make said money, and costs to amount of ________ dollars, as taxed, and costs to accrue under this execution, to be taxed by you; and have said money before me on the ________ day of ________ , A. D. ________ , and have there then this writ.

"Witness my hand the ________ day of ________ A. D. ________ J. P."

Detailed statement of costs, giving each item separately and specifying the law for it, the section and paragraph thereof, viz.; "Issuing summons, $________ , serving summons $________ ," etc.

HISTORY: Codes, 1880, § 2253; 1892, § 2415; 1906, § 2744; Hemingway's 1917, § 2243; 1930, § 2092; 1942, § 1826.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 1.

CJS.

51 C.J.S., Justices of the Peace § 272.

§ 11-9-135. Proceedings in replevin, attachment, liens.

Proceedings in replevin, attachment, trial of a claim to property levied on, and for the enforcement of statutory liens before justices of the peace, shall be, as far as practicable, according to those in the circuit courts, in all like cases.

HISTORY: Codes, 1871, § 1321; 1880, § 2212; 1892, § 2416; 1906, § 2745; Hemingway's 1917, § 2244; 1930, § 2093; 1942, § 1827.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Claim by person not a party to the action of property levied upon, see § 11-23-7 et seq.

Remedy of attachment generally, see § 11-33-1 et seq.

Proceedings before justices of the peace in cases of attachment, see § 11-33-105, 11-33-107.

Enforcement of liens generally, see § 85-7-31 et seq.

JUDICIAL DECISIONS

1. In general.

On a writ of certiorari from a justice court the proper judgment should be either one of affirmance or reversal, and if the latter a proper judgment should be entered. Williams v. Williams, 117 Miss. 251, 78 So. 152, 1918 Miss. LEXIS 172 (Miss. 1918).

In a replevin suit the plaintiff cannot be allowed to recover judgment for a greater value than that alleged in the affidavit. Brown v. Williams-Brooke Co., 106 Miss. 187, 63 So. 351, 1913 Miss. LEXIS 121 (Miss. 1913).

The affidavit in replevin determines the jurisdiction of the court so far as it concerns the value of the property sued for, unless the plaintiff knowingly undervalued or overvalued it for jurisdictional purposes. Ball, Brown & Co. v. Sledge, 82 Miss. 749, 35 So. 447, 1903 Miss. LEXIS 203 (Miss. 1903).

§ 11-9-137. Judgment on merits res adjudicata.

When any suit brought before a justice of the peace shall be finally decided on its merits by the justice, it shall be a bar to a recovery for the same cause of action or setoff in any other suit.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (15); 1857, ch. 58, art. 19; 1871, § 1316; 1880, § 2213; 1892, § 2417; 1906, § 2746; Hemingway's 1917, § 2245; 1930, § 2094; 1942, § 1828.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

JUDICIAL DECISIONS

1. In general.

Justice's judgment on merits against plaintiff, though it should have been of nonsuit for failure to prosecute, held only erroneous, and available as res judicata. Childress v. Thomas Dry Goods Co., 145 Miss. 429, 110 So. 861, 1927 Miss. LEXIS 129 (Miss. 1927).

The testimony of the justice of the peace is incompetent to vary the effect of his decision as to the matter of res judicata. Munn v. S. F. Bowser & Co., 114 Miss. 500, 75 So. 372, 1917 Miss. LEXIS 55 (Miss. 1917).

RESEARCH REFERENCES

ALR.

Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 A.L.R.2d 514.

CJS.
51 C.J.S., Justices of the Peace §§ 254-258.

§ 11-9-139. Execution of judgment may be stayed.

If the party against whom judgment is given, shall, within ten days thereafter, procure some responsible person to appear before the justice, and in writing, to be entered on the docket of the justice and signed by such person, consent to become surety therefor, the justice shall grant a stay of execution for thirty days from the date of the judgment on all sums not exceeding fifty dollars and for sixty days on all sums over fifty dollars. In case the money be not paid at the expiration of such stay, execution shall issue against the principal and sureties, or either of them, for the principal, interest, and costs.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (16); 1857, ch. 58, art. 22; 1871, § 1343; 1880, § 2214; 1892, § 2418; 1906, § 2747; Hemingway's 1917, § 2246; 1930, § 2095; 1942, § 1829.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

Am. Jur.
47 Am. Jur. 2d, Justices of the Peace § 26.
15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 42 (Affidavit of amount due for stay of execution).

CJS.
51 C.J.S., Justices of the Peace § 277.

§ 11-9-141. Effect of stay.

A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.

HISTORY: Codes, 1871, § 1344; 1880, § 2215; 1892, § 2419; 1906, § 2748; Hemingway's 1917, § 2247; 1930, § 2096; 1942, § 1830.

RESEARCH REFERENCES

CJS.
51 C.J.S., Justices of the Peace § 277.

§ 11-9-143. Trial by jury.

On or before the return day of the process either party may demand a trial by jury, and thereupon the justice of the peace shall order the proper officer to summon six persons, competent to serve as jurors in the circuit court, to appear immediately, or at such early day as he may appoint, whether at a regular term or not, who shall be sworn to try the case; but each party shall be entitled to challenge peremptorily two jurors, and as many more as he can show sufficient cause for. If a sufficient number of jurors shall not appear, others may be summoned until a jury is made up, to consist of six, against whom legal objections shall not exist. If the jury fail to agree, it may be discharged and another jury summoned, and so on until a verdict is obtained, and judgment shall be entered by the justice on the verdict.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 10 (5); 1857, ch. 58, art. 26; 1871, § 1326; 1880, § 2222; 1892, § 2425; 1906, § 2754; Hemingway's 1917, §§ 2253; 1930, § 2102; 1942, § 1836.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Selection of petit jury, generally, see § 13-5-65 et seq.

JUDICIAL DECISIONS

1. In general.

In civil jury trial in Federal District Court, equal protection component of Fifth Amendment due process clause prohibits private litigant from using peremptory challenge to exclude prospective jurors on account of race because such race-based exclusion violates equal protection rights of excluded jurors; opposing litigant has third-party standing to raise excluded jurors' rights in opposing litigant's own behalf; and, while role of litigants in determining jury's composition may provide one reason for wide acceptance of jury system and its verdicts, if race stereotypes are price for acceptance of jury panel, price is too high to meet standard of constitution. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660, 1991 U.S. LEXIS 3023 (U.S. 1991).

OPINIONS OF THE ATTORNEY GENERAL

A justice of peace does not have authority to designate individuals to perform jury duty in the justice of peace court. Ops. Atty. Gen. (Opinion dated October 30, 1969, added to 1972 Code section 11-9-143).

Either party in a civil case in justice court is entitled to a jury trial. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

The cost of a jury trial for a civil case in justice court is not one that is contemplated to be paid in advance under § 9-11-10. As a general rule, the losing party in a civil case bears the burden of all court costs, however, the judge has some discretion is assessing the costs. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

The "return day of the process" as set forth in this section means the day the case is set for trial. Further, a justice court may refuse a request for a jury trial if a party fails to request a jury trial "on or before the return day of the process". Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

A criminal warrant does not have a return date. However, if a defendant's bond is made returnable to a plea date, such a date would constitute the return day of process. If a defendant pleads not guilty on the plea date, the court should inquire if the defendant demands a jury trial. If the bond is returnable to a trial date, the trial date is considered the return day of process and the defendant could demand a jury trial at any time until the trial begins. Hood, Sept. 17, 2004, A.G. Op. 04-0455.

RESEARCH REFERENCES

ALR.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding. 70 A.L.R.4th 1119.

Prospective juror's connection with insurance company as ground for challenge for cause. 9 A.L.R.5th 102.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury–post-Batson state cases. 47 A.L.R.5th 259.

Am. Jur.

47 Am. Jur. 2d, Jury §§ 120 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 1.1 (Demand for jury trial – Indorsed on pleadings).

CJS.

50A C.J.S., Juries §§ 188-191.

§ 11-9-145. Multiple cases tried by same jury.

If a justice have more jury cases than one on the same day, he shall use the same jury for the trial of each, subject to the right of challenge by either party and like proceedings in all respects as in other cases. If more cases than one be tried by the same jury, the justice shall apportion the cost of the jury among the several cases and tax it in accordance with justice.

HISTORY: Codes, 1871, § 1328; 1880, § 2224; 1892, § 2426; 1906, § 2755; Hemingway's 1917, § 2254; 1930, § 2103; 1942, § 1837.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-9-147. Trial by jury; fining of delinquent jurors.

The justice of the peace may fine any person summoned as a juror failing to attend in any sum not exceeding ten dollars; and if such person, when summoned to show cause why the fine should not be made final, shall not appear and show cause, execution shall issue for the fine and costs.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 10 (7); 1857, ch. 58, art. 27; 1871, § 1329; 1880, § 2225; 1892, § 2427; 1906, § 2756; Hemingway's 1917, § 2255; 1930, § 2104; 1942, § 1838.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Penalty for juror's failure to perform his duties, see § 13-5-83.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Jury § 136.

CJS.

50A C.J.S., Juries §§ 210-214, 237.

CHAPTER 11.

VENUE OF ACTIONS

In General. 11-11-1
Change of Venue. 11-11-51

IN GENERAL

Sec.

11-11-1.	Provisions of this chapter applicable to all courts.
11-11-3.	County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.
11-11-5 and 11-11-7.	Repealed.
11-11-9.	Actions against executors.
11-11-11 and 11-11-13.	Repealed.
11-11-15.	Actions against State Board of Health or State Board of Medical Licensure.
11-11-17.	Where court has jurisdiction of subject matter but not venue.
11-11-19.	Where brought if judge interested.

§ 11-11-1. Provisions of this chapter applicable to all courts.

All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

HISTORY: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; 1906, § 687; Hemingway's 1917, § 465; 1930, § 474; 1942, § 1412.

Cross References — Transfer of cases from the circuit court to the county court, see § 9-9-27.

Other sections derived from same 1942 code section, see §§ 11-1-57, 11-7-1, 91-1-15.

Venue of actions, suits, and proceedings in the county court, see § 11-9-3.

Application of law of evidence, see § 13-1-1.

Application of law of process generally, see § 13-3-1.

Jurisdiction and venue of criminal offenses generally, see § 99-11-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Venue.
3. Dismissal.
4. Evidence.

1. In general.

In view of Code 1930, § 474, and Code 1930, §§ 575, 1397, case held triable at return term of circuit court, where summons was served July 21 and made returnable August 20, as against contention that both day of service and day of return had to be excluded. Mississippi C. R. Co. v. Aultman, 173 Miss. 622, 160 So. 737, 1935 Miss. LEXIS 205 (Miss. 1935).

By this section [Code 1942, § 1412], the provisions of the chapter are made applicable to all courts, and this embraces the county court; and, accordingly, conviction on a plea of guilty entered on an amendable affidavit is good and cannot be set aside on certiorari because of a defective affidavit. Bogle v. State, 155 Miss. 612, 125 So. 99, 1929 Miss. LEXIS 347 (Miss. 1929).

2. Venue.

Venue is right as valuable to defendant as to plaintiff. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

In view of this section [Code 1942, § 1412], a fraternal benefit association may be sued in the chancery court of the county in which the beneficiary resides. Masonic Ben. Ass'n v. Dotson, 111 Miss. 60, 71 So. 266, 1916 Miss. LEXIS 240 (Miss. 1916).

3. Dismissal.

Where a suit was brought in chancery court for cancelation of a conveyance on the ground that it has never been delivered, the chancellor should have granted the complaint's motion for voluntary dismissal without prejudice where there was no submission to the chancellor for final decision on merits. Graham v. Graham, 214 Miss. 99, 58 So. 2d 85, 1952 Miss. LEXIS 449 (Miss. 1952).

A complainant in the chancery court has the right under the statute to dismiss his suit without prejudice. This rule applies in all cases where the defendant will not be prejudiced by a dismissal. Adams v. Lucedale Commercial Co., 113 Miss. 608, 74 So. 435, 1917 Miss. LEXIS 137 (Miss. 1917); Adams v. Dean, 74 So. 436 (Miss. 1917); Adams v. Leatherbury, 74 So. 436 (Miss. 1917); Adams v. McInnis, 74 So. 436 (Miss. 1917).

4. Evidence.

Under the provisions of this section [Code 1942, § 1412], Code 1942, § 1469 is applicable to suits in the chancery court. General Acceptance Corp. v. Holbrook, 254 Miss. 78, 179 So. 2d 845, 1965 Miss. LEXIS 927 (Miss. 1965).

In action of unlawful entry and detainer, introduction in evidence of deed to plaintiff held not objectionable on ground that no copy of deed was filed as exhibit to declaration, since statute (§ 3458, Code 1930) made no such requirement. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Statutes requiring copy of writing to be annexed to declaration or bill before evidence of writing may be introduced applies to chancery court as well as to circuit court. Thomas v. B. Rosenberg & Sons, Inc., 153 Miss. 314, 120 So. 732, 1929 Miss. LEXIS 18 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Validity of contractual provision limiting place or court in which action may be brought. 31 A.L.R.4th 404.

Venue under 29 USCS § 1132(e)(2) of suits brought under Employee Retirement Income Security Act of 1974 (29 USCS §§ 1001 et seq). 56 A.L.R. Fed. 757.

Am. Jur.

20 Am. Jur. 2d, Courts §§ 29, 30 et seq.

§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

(4)(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(i) Relative ease of access to sources of proof;

(ii) Availability and cost of compulsory process for attendance of unwilling witnesses;

(iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;

(v) Administrative difficulties for the forum courts;

(vi) Existence of local interests in deciding the case at home; and

(vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

HISTORY: Codes, Hutchinson's 1848, ch. 58, art. 1 (19); 1857, ch. 61, art. 32; 1871, § 522; 1880, § 1498; 1892, § 650; 1906, § 707; Hemingway's 1917, § 486; 1930, § 495; 1942, § 1433; Laws, 1908, ch. 166; Laws, 1940, ch. 248; Laws, 1984, ch. 429; Laws, 2002, 3rd Ex Sess, ch. 2, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 1; Laws, 2004, 1st Ex Sess, ch. 1, § 1, eff from and after Sept. 1, 2004, and applicable to all causes of action filed on or after Sept. 1, 2004.

Cross References — The venue of actions, suits, and proceedings in the county court, see § 11-9-3.

Change of venue in cases involving trial of right of property, see § 11-23-23.

The venue of criminal prosecutions generally, see §§ 99-11-3 to 99-11-23.

Change of venue in criminal prosecutions, see § 99-15-35.

Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction and application generally.
3. Jurisdiction.
4. Venue where defendant resides or is found.
5. Venue where acts or substantial event occurred.
6. Venue as to corporations.
7. —Where cause of action occurs or accrues.
8. —Foreign corporations.
9. Municipal corporations.
10. Actions relating to land; ejectment, etc.
11. —Land located in two or more counties.
12. Change of venue in general.
13. —Public officers.
14. —Proceedings in rem.
15. —Consent, effect of.
16. —Waiver.
17. —Burden of proof.
18. Illustrative cases.

1. In general.

Trial court did not err in dismissing a football player's complaint without prejudice because venue was improper in Madison County, Mississippi; no credible evidence existed, either alleged in the complaint or in supporting affidavits, to suggest that the football player was a resident or domiciliary of Mississippi at the time the complaint was filed. Ramsey v. Auburn Univ., 191 So. 3d 102, 2016 Miss. LEXIS 82 (Miss. 2016).

Circuit court abused its discretion in dismissing a personal injury complaint when the injured driver lacked an alternate forum in which to file her suit due to the expiration of the statute of limitations, and though the language of the stipulation complied with Miss. Code Ann. § 11-11-3(4)(b), the effect of the dismissal did not. Williams v. Liberty Mut. Fire Ins. Co., 187 So. 3d 166, 2015 Miss. App. LEXIS 379 (Miss. Ct. App. 2015).

Supreme Court may properly consider issues pertaining to venue via interlocutory appeal. Forrest County Gen. Hosp. v. Conway, 700 So. 2d 324, 1997 Miss. LEXIS 457 (Miss. 1997).

Venue is valuable right possessed by both plaintiff and defendant. Forrest County Gen. Hosp. v. Conway, 700 So. 2d 324, 1997 Miss. LEXIS 457 (Miss. 1997).

Venue is right as valuable to defendant as to plaintiff. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

Mississippi has rejected common law local action doctrine, and § 11-11-3 alone determines whether court can exercise jurisdiction over "local" cause of action.

Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1992 U.S. App. LEXIS 569 (5th Cir. Miss. 1992).

Section [Code 1942, § 1433] fixing venue of suits in state courts either in the district where the cause of action accrues or where the defendant has its principal place of business is inapplicable to prevent a resident of the Federal Northern District of Mississippi from suing a foreign corporation having its principal place of business in the Southern District in the Federal court of the Northern District rather than the Southern District, even though in obedience to laws of Mississippi the corporation had designated an agent for service of process who resided in the Southern District and the cause of action accrued in that district, where a Federal statute fixing venue permitted suit in either the Northern or the Southern District. Murphree v. Mississippi Pub. Corp., 149 F.2d 138, 1945 U.S. App. LEXIS 2565 (5th Cir. Miss. 1945), aff'd, 326 U.S. 438, 66 S. Ct. 242, 90 L. Ed. 185, 1946 U.S. LEXIS 3100 (U.S. 1946).

The statute, with respect to change of venue in suits against public officers, is not discriminatory. Pan-American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480, 1930 Miss. LEXIS 238 (Miss. 1930), overruled, Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541, 1951 Miss. LEXIS 458 (Miss. 1951).

Statute relating to venue of civil actions held not to discriminate against foreign corporations. Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74, 1929 Miss. LEXIS 264 (Miss. 1929).

2. Construction and application generally.

There is no manifest contrary intention to keep the language singular in Miss. Code Ann. § 11-11-3(3), and under case-specific facts, § 11-11-3(3) may take the plural form. Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

Supreme Court of Mississippi holds there is no manifest contrary intention to keep the language singular in Miss. Code Ann. § 11-11-3(3), and under case-specific facts, § 11-11-3(3) may take the plural form. Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

Miss. Code Ann. § 11-11-3(3) plainly and unambiguously provides that where both defendants are private medical defendants and where an act or omission occurred in both counties forming an indivisible injury, both counties satisfy the single category defined within § 11-11-3(3). Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

Where two medical defendants fall within the same category, the Supreme Court of Mississippi holds that Miss. Code Ann. § 11-11-3(3) does not contain any language preventing permissive joinder under Miss. R. Civ. P. 20. Further, the plain language does not prevent the application of Miss. R. Civ. P. 82(c). Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

In bringing their medical malpractice claims, the husband and wife were allowed to choose between two counties where both counties satisfied the categorical requirement contained in Miss. Code Ann. § 11-11-3(3) and the medical center and the various healthcare providers had been properly joined. Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

Statute pertains to civil actions of which the circuit court has original jurisdiction, not exclusive jurisdiction; only subsection (1)(a)(i) specifies venue in "circuit court," every other subsection refers to "any civil actions," and therefore, the statute is applicable to civil actions in "all courts." Purdue Pharma L.P. v. State, 256 So. 3d 1, 2018 Miss. LEXIS 415 (Miss. 2018).

Plaintiff could not establish venue in Hinds County pursuant to any basis provided for in Miss. Code Ann. § 11-11-3(1)(a)(i) for the following reasons: (1) defendant, resided in Rankin County at the time of the accident; (2) the insurance company's principal place of business was outside of Mississippi; (3) the communications received in Hinds County by plaintiff between himself and the insurance company were not sufficient to show that a substantial alleged act or omission occurred in Hinds County; and (4) the accident, which occurred in Rankin County, was "a substantial event that caused the injury. Holmes v. McMillan, 21 So. 3d 614, 2009 Miss. LEXIS 567 (Miss. 2009).

In a contractor's action against a subcontractor, because there was a resident defendant, the subcontractor, venue was proper only in a county where the resident defendant lived or where the cause of action occurred. Thus the trial court abused its discretion in denying a change of venue and misinterpreted Miss. Code Ann. §§ 11-11-3 and 11-11-7 because Miss. Code Ann. § 11-11-3 was mandatory and Miss. Code Ann. § 11-11-7 was permissive Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

Where the insurer alleged that the insured committed insurance fraud, the insured's assertion that it was an in personam action, with venue in the county where the insured resided, was rejected; the specific terms of Miss. Code Ann. § 11-5-1 regarding venue for real and personal property actions, prevailed over the general terms of Miss. Code Ann. § 11-11-3, which placed venue generally in the county of the defendant's residence, thus, venue was properly in the county of the insurer's office where the certificates were issued, and from where the claims were paid. Guice v. Miss. Life Ins. Co., 836 So. 2d 756, 2003 Miss. LEXIS 56 (Miss. 2003).

Of right, plaintiff selects among permissible venues, and his choice must be sustained unless, in the end, there is no factual basis for claim of venue. Forrest County Gen. Hosp. v. Conway, 700 So. 2d 324, 1997 Miss. LEXIS 457 (Miss. 1997).

Venue in wrongful death action alleging medical malpractice was proper either in county in which patient died some six months after allegedly negligent care was rendered, or in county in which that care was rendered. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

Terms "occurs" and "accrues," as used in venue statute, are not synonymous, legally or otherwise. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

Cause of action "accrues," for venue purposes, when it comes into existence as enforceable claim, that is, when right to sue becomes vested; this may well mean moment injury is inflicted, that point in space and time when last legally significant fact is found. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

Cause of action must exist and be complete before action can be commenced, and, when suit is begun before cause of action accrues, it will generally be dismissed if proper objection is made. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

If plaintiff selects among permissible venues, his choice must be sustained unless in end there is no credible evidence supporting factual basis for claim of venue; put otherwise, plaintiff must be given benefit of reasonable doubt. McMillan v. Puckett, 678 So. 2d 652, 1996 Miss. LEXIS 215 (Miss. 1996).

For purposes of venue, cause of action in wrongful death case may occur and/or accrue in both county where death occurred and county where alleged negligence took place, making either county, if they are different, permissible venue. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

Wrongful death action arising out of medical care and/or treatment rendered to decedent by physicians was properly venued either in county where alleged negligence occurred or in county where decedent died. Burgess v. Lucky, 674 So. 2d 506, 1996 Miss. LEXIS 266 (Miss. 1996).

There is no language in § 11-11-5 suggesting that it is the only venue statute to which parties may resort in an action against a railroad. If one of the 3 alternative tests for venue in the railroad venue statute be met, the parties are limited to those 3 choices. However, where one of the tests for venue under the railroad venue statute is not met, the language of the statute does not exhaust the possibility of proper venue against the railroad. The railroad venue statute, because it employs the permissive "may," requires that it be read in conjunction with the general venue statute, § 11-11-3, which provides that actions "shall" be commenced in one of the counties authorized, "except where otherwise provided." Missouri Pac. Missouri P. R. Co. v. Tircuit, 554 So. 2d 878, 1989 Miss. LEXIS 498 (Miss. 1989).

In an action to set aside an allegedly fraudulent conveyance of personal property, venue was in the county in which the property was located since the specific terms of Code 1972, § 11-5-1 prevail over the general terms of Code 1972, § 11-11-3. Green v. Winona Elevator Co., 319 So. 2d 224, 1975 Miss. LEXIS 1475 (Miss. 1975).

In a replevin action, a motion to exclude evidence offered by the plaintiff and direct a verdict for the defendants on the ground that the court lacked venue jurisdiction, made at the conclusion of plaintiff's evidence, was not timely. Ainsworth v. Blakeney, 232 Miss. 297, 98 So. 2d 880, 1957 Miss. LEXIS 476 (Miss. 1957).

Where there are two or more defendants to a transitory cause of action the venue of which is fixed by statute in either of two or more counties, the plaintiff or complainant may elect to bring the suit in either county, provided that the defendant in the county where the suit is brought is a material party and there is a valid cause of action against him and he is not fraudulently joined for the purpose of fixing venue. Myers v. Vinson, 212 Miss. 85, 54 So. 2d 168, 1951 Miss. LEXIS 430 (Miss. 1951).

Plaintiff should not be permitted to fix venue by agreement with alleged joint tort-feasor when so to do will destroy statutory right of joint tort-feasor as to venue of cause against him. Nicholson v. Gulf, M. & N. R. Co., 177 Miss. 844, 172 So. 306, 1937 Miss. LEXIS 168 (Miss. 1937).

Allegations of declaration are not conclusive on question of proper venue. Trolio v. Nichols, 160 Miss. 615, 133 So. 207 (Miss. 1931); Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

Statute fixing venue in action against railroad in any county in which line of railroad runs is applicable only when railroad is sued alone; suit against two or more railroads as necessary defendants or against several defendants living in separate counties falls under provisions of general venue statutes. Clark v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

The statute does not apply to a suit of replevin. Ellison v. Lewis, 57 Miss. 588, 1880 Miss. LEXIS 6 (Miss. 1880).

3. Jurisdiction.

Although compelling interests, such as territorial limits inherent in in rem title dispute or internal police regulations of foreign state, can in some cases permit, but not require, Mississippi Court to forego exercise of its judicial power. No such compelling interests exist in action brought by building owner against company which designed and manufactured fire-proofing materials containing asbestos which were installed in plaintiff's building. Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1992 U.S. App. LEXIS 569 (5th Cir. Miss. 1992).

Dismissal, after settlement, of the defendant residing in the county in which suit was brought, does not affect jurisdiction of the suit in such county against the nonresident defendant. New Biloxi Hospital, Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882, 1962 Miss. LEXIS 544 (Miss. 1962).

Court should refuse to exercise jurisdiction obtained by agreement with one of two joint tort-feasors, since result thereof constitutes fraud on jurisdiction of court, and such acts become fraudulent in nature, where purpose and result is to defeat right guaranteed by law, notwithstanding that lawful act does not become unlawful merely because it may be done by agreement between parties. Nicholson v. Gulf, M. & N. R. Co., 177 Miss. 844, 172 So. 306, 1937 Miss. LEXIS 168 (Miss. 1937).

Defendant in county of whose residence action was brought against several must be a material defendant, proper party, and not joined for the sole purpose of conferring jurisdiction. Trolio v. Nichols, 160 Miss. 615, 133 So. 207 (Miss. 1931).

Actions other than local must be commenced in the county in which the defendants or some of them may be found, and jurisdiction does not attach where defendant is served with process from a county other than his residence. Cook v. Pitts, 114 Miss. 39, 74 So. 777, 1917 Miss. LEXIS 9 (Miss. 1917).

4. Venue where defendant resides or is found.

Venue was proper in the county where an action was commenced because the county was where the land at issue was located, where the decision was made to purchase the property, where a purported partnership was formed among the parties, and where the sale of the land occurred that resulted in a profit. Latham v. Johnson, 262 So. 3d 569, 2018 Miss. App. LEXIS 314 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 48 (Miss. 2019).

Pursuant to the general venue statute, venue was proper in the First Judicial District of Harrison County because the Mississippi State Port Authority "resided" there; the Port Authority's offices, operations, employees, and commissioners were located in Harrison County, and thus, the Port Authority both "resided" and had its "principal place of business" in Harrison County. Miss. State Port Auth. at Gulfport v. S. Indus. Contrs. LLC, 271 So. 3d 742, 2018 Miss. App. LEXIS 653 (Miss. Ct. App. 2018).

Trial court erred in granting a corporation's motion for a change of venue where, in adopting Miss. Code Ann. § 11-11-3(1)(b) (Rev. 2004), the legislature intended that a corporation would have only one place of business, the corporation was a nonresident defendant with its principal place of business in another state, and thus, plaintiff was entitled to commence his action in the county where he resided. Smith v. Kan. City Southern Ry. Co., 214 So. 3d 272, 2017 Miss. LEXIS 119 (Miss. 2017).

Trial court did not abuse its discretion in finding that Madison County, Mississippi, was not the proper venue for a university football player's lawsuit because the university was not incorporated or situated in Madison County, and the university's head strength and conditioning coach did not reside in Madison County; the football player's receipt of mail at his residence and his signing of his National Letter of Intent in Madison County, standing alone, were insufficient to create venue. Ramsey v. Auburn Univ., 191 So. 3d 102, 2016 Miss. LEXIS 82 (Miss. 2016).

Appeal of a prisoner's jail-time credit grievance, brought in the Lowndes County Circuit Court, was properly dismissed for improper venue because: (1) if the motion had been for post-conviction relief, jurisdiction would have been proper in Lowndes County because that was where the prisoner's conviction had been obtained; (2) however, the motion was not for post-conviction relief; (3) rather, the prisoner was appealing the decision of an administrative agency, and as a result, jurisdiction was proper in the county where the defendant resided, which in the case at hand was Marion County, the prisoner's county of incarceration. Stokes v. State, 984 So. 2d 1089, 2008 Miss. App. LEXIS 374 (Miss. Ct. App. 2008).

Inmate's claim that applying Miss. Code Ann. § 47-5-138.1 constituted an ex post facto law was improperly dismissed for improper venue where the inmate only took issue with whether the inmate was entitled to trusty earned time, venue was governed by Miss. Code Ann. § 11-11-3(a), and where the action was filed in the county where the inmate was incarcerated at a facility where two prison officials worked and the actions that denied the inmate trusty earned time occurred. Horton v. Epps, 966 So. 2d 839, 2007 Miss. App. LEXIS 664 (Miss. Ct. App. 2007).

Change of venue should have been granted because the mandatory language of the general venue statute of former Miss. Code Ann. § 11-11-3 controlled over the permissive language of former Miss. Code Ann. § 11-11-11 so that plaintiffs were not entitled to establish venue in their county of residence when a resident defendant was a party to the negligence suit; Miss. R. Civ. P. 82(c) did not establish venue in plaintiffs' county of residence, and venue was determined from the date of original filing so that the dismissal of the resident defendant did not cure or correct improper venue where the alleged slip and fall and negligent medical treatment occurred in another county. Crenshaw v. Roman, 942 So. 2d 806, 2006 Miss. LEXIS 655 (Miss. 2006).

Venue in a personal injury action was improper in Hinds County because a defendant, who resided in Hinds County, was improperly joined as he was not present at the skating rink when the accident took place, he was not responsible for supervising public sessions, and he had no duty to discourage high speed skating. Park on Lakeland Drive, Inc. v. Spence,

941 So. 2d 203, 2006 Miss. LEXIS 584 (Miss. 2006).

Trial court erred in dismissing for lack of jurisdiction an inmate's suit against prison employees that challenged the earned time credit on his armed robbery sentence because contrary to the holding of the trial court, the matter was not in the nature of postconviction relief. Because the inmate was suing the employees of the prison, venue was appropriate in the county where the prison was located. Guy v. State, 915 So. 2d 508, 2005 Miss. App. LEXIS 898 (Miss. Ct. App. 2005).

Where plaintiff, a resident of Claiborne County, Mississippi, sued two nonresident defendants and a doctor who resided in Warren County, Mississippi, Miss. Code Ann. § 11-11-3(1) (Supp. 2001) dictated that Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. The permissive language of the statute–"may also be commenced in the county in which the plaintiff resides"–applied only where there was no resident defendant. Namihira v. Bailey, 891 So. 2d 831, 2005 Miss. LEXIS 38 (Miss. 2005).

Both Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to county of proper venue–i.e., Warren County–where the reason for the transfer was the inability to seat an impartial jury. Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Namihira v. Bailey, 891 So. 2d 831, 2005 Miss. LEXIS 38 (Miss. 2005).

Medical malpractice action against hospital and physician at hospital, which was based on alleged negligence in failing to diagnose disease of child patient, occurred or accrued, for purposes of venue statute in county where hospital was located, and not in separate county where injuries manifested themselves after patient was transferred to university hospital, and thus, county where university hospital was located, in which neither plaintiff nor any of named defendants resided, was not proper venue for action. Forrest County Gen. Hosp. v. Conway, 700 So. 2d 324, 1997 Miss. LEXIS 457 (Miss. 1997).

In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true where the defendant upon whom venue is based is subsequently dismissed from the suit. In such situations, venue as to the remaining defendants continues despite the fact that venue would have been improper if the original action had named them only. Blackledge v. Scott, 530 So. 2d 1363, 1988 Miss. LEXIS 434 (Miss. 1988).

The right to be sued in the county of one's residence is a valuable right. Crosby v. Robertson, 243 Miss. 420, 137 So. 2d 916, 1962 Miss. LEXIS 358 (Miss. 1962).

The staying, for 45 days, of an order granting a change of venue of an action dismissed as to a resident defendant, to the county in which the other defendants reside, is ineffectual to retain jurisdiction to render judgment, where the application for a stay merely states that it has been discovered that another resident of the county should be named as a defendant, without giving his name, stating how he is involved, or what facts created his liability. Crosby v. Robertson, 243 Miss. 420, 137 So. 2d 916, 1962 Miss. LEXIS 358 (Miss. 1962).

A judgment recovered in an action brought in Forrest County, place of plaintiff's residence, for the value of certain merchandise allegedly sold to a resident of Jones County, upon whom service was made by leaving a copy of the summons with his wife, was void. Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730, 1957 Miss. LEXIS 560 (Miss. 1957).

Where a default judgment recovered in an action brought in Forrest County, place of plaintiff's residence, for the value of certain merchandise allegedly sold to the resident of Jones County, upon whom service was made by leaving a copy of the summons with defendant's wife, was void, the defendant was not compelled to appear in the case and move for change of venue to the county of his residence; nor did he submit himself to the jurisdiction of the court and waive venue of the action by attacking the legality of the summons, the validity of judgment, and denying his liability to the plaintiff. Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730, 1957 Miss. LEXIS 560 (Miss. 1957).

Proper venue of mandamus proceeding against commissioner of Mississippi Highway Safety Patrol is public officer's official domicil, that is, the City of Jackson in the First Judicial District of Hinds County. Birdsong v. Grubbs, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Circuit Court of Lamar County had venue of personal action against resident of Lauderdale County when joined with a defendant who was resident of Lamar County, though local resident had been judicially declared non compos mentis, was personally served with summons under original declaration to which his guardian was not a party, and later served with summons issued on amended complaint for guardian and ward, after service of summons and copy issued on amended complaint was served on his guardian. Owen v. Sumrall, 204 Miss. 15, 36 So. 2d 800, 1948 Miss. LEXIS 339 (Miss. 1948).

Right of a citizen to be sued in the county of his residence is a valuable right, and, when there are several defendants in a non-local civil action residing in different counties, the action must be brought in the county of the residence of a real and material defendant. Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

Good faith of plaintiff in joining as party defendant resident of county in which action is commenced with residents of another county, is pertinent only where the facts of liability vel non against a resident defendant are involved in a complicated set of circumstances from which, when fully developed, more than one reasonable conclusion might be drawn by the jury or where because of nice distinctions to be applied as a matter of law, it cannot be told in advance of a full development of the case whether the resident defendant will be held liable by the courts. Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

In action for death of automobile occupant, declaration alleging that deceased's driver failed to exercise reasonable care to avoid collision with driver of another automobile crossing intersection at high speed stated cause of action against both drivers, and hence venue should not be changed from county of first driver's residence. Daniel v. Livingstone, 168 Miss. 311, 150 So. 662, 1933 Miss. LEXIS 177 (Miss. 1933).

Defendant in county of whose residence action was brought against several must be material defendant, proper party, and not joined for sole purpose of conferring jurisdiction. Trolio v. Nichols, 160 Miss. 615, 133 So. 207 (Miss. 1931).

Where defendant in whose county action against several is brought is joined for fraudulent purpose of conferring jurisdiction, cause will be dismissed or transferred. Trolio v. Nichols, 160 Miss. 615, 133 So. 207 (Miss. 1931).

Judgment against defendant, a nonresident of county of suit, held voidable, if not void, where resident defendant was not served with process. Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252, 1930 Miss. LEXIS 364 (Miss. 1930).

Manufacturer's agent may be joined as defendant in suit based on negligence in permitting deleterious substances in drinks; agent of manufacturer was properly joined in suit for permitting deleterious substances in drinks and venue properly laid in county where agent is doing business. Bufkin v. Grisham, 157 Miss. 746, 128 So. 563, 1930 Miss. LEXIS 326 (Miss. 1930).

Where there are two defendants suit may be brought in the county of the residence of either. Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409, 1919 Miss. LEXIS 162 (Miss. 1919).

Under Acts 1894, ch 64, no exception is created to the rule embodied in Code 1892, § 650 (Code 1906, § 707), and a foreign surety company under that act could only be sued in the circuit court of a county in which it has an agent upon whom process could there be served. American Surety Co. v. Holly Springs, 77 Miss. 428, 27 So. 612, 1899 Miss. LEXIS 84 (Miss. 1899).

Where the defendant, after the commencement of a suit but before the service of process on him, removes into another county, plaintiff may have a testatum writ. Andrews v. Powell, 41 Miss. 729, 1868 Miss. LEXIS 28 (Miss. 1868).

Where an action is begun against several persons and none are served in the county, and the suit is dismissed as to those who reside there, and who have never been served, jurisdiction will be gone. Wolley v. Bowie, 41 Miss. 553, 1867 Miss. LEXIS 32 (Miss. 1867).

If the defendant in the county be served, the suit may be discontinued as to him without losing jurisdiction. Read v. Renaud, 14 Miss. 79, 1846 Miss. LEXIS 33 (Miss. 1846).

Where duplicate writs are issued and are served upon all of the defendants in a county other than that in which the suit was brought, and the process to the county where the suit is brought was returned "not found" as to all, the court should dismiss the case for want of jurisdiction on a showing that all defendants, at the time the suit was begun, lived out of the county. Bank of Vicksburgh v. Jennings, 6 Miss. 425, 1841 Miss. LEXIS 16 (Miss. 1841).

5. Venue where acts or substantial event occurred.

Trial court erred in denying defendant's motion to transfer venue because a permissible venue existed, and it was not proper for plaintiffs to select the county of residence of one of the plaintiffs; the proper venue was in the county where the accident occurred because the accident was a substantial event that caused plaintiffs' injury, and the corporate defendants did not have principal places of business in Mississippi, and the alleged acts or omissions occurred outside Mississippi. Herman Grant Co. v. Washington, 214 So. 3d 266, 2017 Miss. LEXIS 122 (Miss. 2017).

Trial court did not abuse its discretion in finding that Madison County, Mississippi, was not the proper venue for a university football player's lawsuit because the football player did not articulate that the university or its head strength and conditioning coach either committed a substantial alleged act or omission or that a substantial event that caused his injury occurred in Madison County; the football player did not plead such facts in his complaint. Ramsey v. Auburn Univ., 191 So. 3d 102, 2016 Miss. LEXIS 82 (Miss. 2016).

Insured's dismantling of a building in Warren County and the resultant lawsuit constituted a substantial event that caused injury pursuant to Miss. Code Ann. § 11-11-3(1)(a)(i). The insured established adequately that Warren County was a proper venue, and the insured's choice of permissible venue options controlled. Greenwood v. Mesa Underwriters Specialty Ins. Co., 179 So. 3d 1082, 2015 Miss. LEXIS 581 (Miss. 2015).

It was error to deny insureds' motion to transfer venue to Smith County in an insurer's action disputing coverage, as the insurer failed to provide sufficient facts to show that venue was proper in Rankin County because there was no "significant act or omission" or "substantial event causing injury" there; the insureds resided in Smith County, the accident happened there, and any misrepresentations in the policy occurred in Covington County. Wood v. Safeway Ins. Co., 114 So. 3d 714, 2013 Miss. LEXIS 325 (Miss. 2013).

Pursuant to Miss. Code Ann. § 11-11-3, venue was proper only in Rankin County on the beneficiary's claim against the insurer for benefits because the insurer's agents resided in Rankin County and the beneficiary was in Smith County only when he was informed of the denial of benefits, which was insufficient to establish venue. Am. Family Life Assur. of Columbus v. Ellison, 4 So. 3d 1049, 2009 Miss. LEXIS 72 (Miss. 2009).

Because "substantial alleged acts," as well as "a substantial event that caused injury" occurred in plaintiff renters' choice of venue, i.e., their personal property was damaged there and the acts upon which they based their tort claims took place there, venue was proper in the county of their choice as it was one of four choices laid out under Miss. Code Ann. § 11-11-3(1)(a)(I) and the trial court erred in transferring the case. Hedgepeth v. Johnson, 975 So. 2d 235, 2008 Miss. LEXIS 103 (Miss. 2008).

6. Venue as to corporations.

Venue of a mandamus action by Hancock County to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison counties, which had been taken over by the highway commission and had become a part of United States Highway 90, was in Hinds County, where the state highway commission had its permanent office. State ex rel. Cowan v. State Highway Com., 195 Miss. 657, 13 So. 2d 614, 1943 Miss. LEXIS 120 (Miss. 1943).

Chancery court of county from which domestic corporation, garnished as debtor of foreign bank in attachment suit against latter, moved its property, office, and place of stockholders' meeting, as permitted by its charter, before issuance of process for it to sheriff of such county, had no territorial jurisdiction of such bank or garnishee. Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 104, 1935 Miss. LEXIS 107 (Miss. 1935).

Employee's suit for personal injuries against employer, a domestic corporation, held not maintainable in county where corporation was not domiciled or other than where injuries were received. Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880, 1931 Miss. LEXIS 29 (Miss. 1931).

"Principle place of business" is synonymous with domicil in determining venue. Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907, 1916 Miss. LEXIS 360 (Miss. 1916).

7. —Where cause of action occurs or accrues.

Trial court did not abuse its discretion in transferring venue to Clarke County, Mississippi pursuant to Miss. Code Ann. § 11-11-3 because a company was a nonresident defendant; thus, venue was appropriate in Clarke County because the substantial alleged act or substantial event causing the injury occurred there, and the subcontractor sought a scheduling order and a trial setting in Clarke County. Reeves v. Midcontinent Express Pipeline, LLC, 119 So. 3d 1097, 2013 Miss. App. LEXIS 263 (Miss. Ct. App. 2013).

In a wrongful death action, a trial court did not err in transferring a hospital and other medical defendants to the county where the hospital was located because under Miss. Code Ann. § 11-11-3(3), the only proper venue for a suit against medical providers was the county in which the alleged act or omission occurred; the presence of medical providers in the action rendered inapplicable the more general venue provision of Miss. Code Ann. § 11-11-3(1)(a)(i). Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652, 2007 Miss. LEXIS 472 (Miss. 2007).

In a doctor's action against a medical malpractice insurer for the insurer's decision not to renew the doctor's medical malpractice insurance, because it was the insurer's decision not to renew the insurance policy that was the alleged cause of the doctor's injuries, every substantial act, omission, or injury-causing event occurred in the county where the insurer was located and made the decision, and venue under Miss. Code Ann. § 11-11-3 was proper in that county; therefore, the chancery court improperly granted, pursuant to Miss. R. Civ. P. 60(b)(6), the doctor's motion to reconsider the chancery court's original order transferring the case to the proper county, as there were no extraordinary circumstances compelling relief from the original order. Medical Assur. Co. v. Myers, 956 So. 2d 213, 2007 Miss. LEXIS 275 (Miss. 2007).

Consumer's alleged injury did not occur or accrue in Smith County; thus, under Miss. Code Ann. § 11-11-3, venue was proper in Wayne County as that was the point of origin of her claim against the pharmaceutical companies, and the performance and interpretation of an echocardiogram in Smith County was not sufficient as to constitute substantial component of the claim. Am. Home Prods. Corp. v. Sumlin, 942 So. 2d 766, 2006 Miss. LEXIS 654 (Miss. 2006).

In the former clients' malpractice action against the attorney who represented them in prior Phen-Fen litigation, the clients claimed that the attorney and his assistant induced them into signing a release and accepting an unfavorable settlement by misrepresentations, and they relied upon conversations, visits, and correspondence carried out or received in Kemper County, the county of their residence. Therefore the trial court correctly applied the applicable venue statute, Miss. Code Ann. § 11-11-3(1), in concluding that the clients were afforded the right to choose among permissible venues and that there choice of venue had to be sustained where there was credible evidence suggesting that the former clients' causes of action accrued and/or occurred in Kemper County such that venue was proper therein. Williamson v. Edmonds, 880 So. 2d 310, 2004 Miss. LEXIS 1031 (Miss. 2004).

Venue in an action which included an automobile insurance company as a defendant was not proper under Miss. Code Ann. § 11-11-7 [Repealed] because a policy issued by an insurance company located in that county covered the insured vehicle for liability only and not property damage occurring in a one-car accident; venue was however proper under Miss. Code Ann. § 11-11-3 as the accident occurred in the first county, and the trial court therefore erred in transferring venue in an action brought by the insured parties from the first county to the county where the other defendants were located. Stubbs v. Miss. Farm Bureau Cas. Ins. Co., 825 So. 2d 8, 2002 Miss. LEXIS 205 (Miss. 2002).

In a personal injury action brought against an airline charter corporation arising from injuries allegedly caused by the shifting of improperly loaded cargo, venue was proper in the county where the cargo was loaded onto the plane, even though the plaintiff's injury occurred at an airport in another state, since a civil action against a corporation is proper in the county where the cause of action occurred, and the injury could not have occurred had it not been for the negligent loading of the airplane. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

In a proceeding upon attachment in chancery to recover for injuries received and to attach nonresident corporate defendant's funds and property at the hands of Mississippi corporation, which operated a motor transportation line in Winston County, and a person residing in Choctaw County, although another defendant resided in Hinds County venue was properly laid in Winston County. Continental Southern Lines, Inc. v. Wicker, 217 Miss. 856, 65 So. 2d 272, 1953 Miss. LEXIS 501 (Miss. 1953).

In an action to recover damages for breach of contract to furnish and install an ice cream freezing unit, the cause of action against a foreign corporation authorized to do business in the state accrued in the county in which the failure to install the unit occurred and therefore the venue was fixed there. Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So. 2d 78, 1952 Miss. LEXIS 491 (Miss. 1952).

A cause of action for libel against a newspaper accrues where the paper is first published. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

In libel action against newspaper, having its place of business in Hinds county, cause of action accrued in Hinds county where alleged libelous matter was first published and circulated, and the fact that the alleged libel was also circulated in Sunflower county through a local distributor, did not establish a new and separate cause of action in Sunflower county. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

Where alleged libel was published by a newspaper corporation in Hinds County, joinder of distributor, circulating paper in Sunflower County, who was not an agent or servant of publisher and who was free to dispose of papers as she saw fit, was not effective to fix venue in Sunflower County. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

Consumer's cause of action for illness resulting from drinking portion of contents of bottle of soda water containing decomposed bodies of roaches held to have "occurred or accrued" in county where drink was purchased and consumed, and not where bottled. Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814, 1936 Miss. LEXIS 228 (Miss. 1936).

Under statute fixing venue of actions against domestic corporations in county where domiciled or in county where cause of action accrued, venue of action against domestic corporation for malicious prosecution held in county where prosecution complained of terminated in defendant's favor, since cause of action could not come into existence until such termination. Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316, 1935 Miss. LEXIS 76 (Miss. 1935).

Where accident resulting in death occurred in J. county, circuit court of J. county had jurisdiction of action for death against domestic corporation domiciled in another county. Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677, 1931 Miss. LEXIS 173 (Miss. 1931).

Foreign corporation designating resident agent could be sued in circuit court of county where transitory cause of action accrued. Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887, 1930 Miss. LEXIS 353 (Miss. 1930).

Foreign corporation designating resident agent is placed, as regards venue in transitory action, in same position as domestic corporation. Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887, 1930 Miss. LEXIS 353 (Miss. 1930).

8. —Foreign corporations.

General venue statute for chancery court did not apply in the State's action against pharmaceutical manufacturers because the location of a foreign corporation's registered agent was irrelevant to determine venue; because the general venue statute for chancery court did not apply, and the general venue statute provided criteria that did not rely on the location of a registered agent, the trial court's reliance on the general venue state was appropriate. Purdue Pharma L.P. v. State, 256 So. 3d 1, 2018 Miss. LEXIS 415 (Miss. 2018).

Because the State's Medicaid agency was located in Hinds County, Mississippi along with most state agencies, venue in Hinds County was appropriate in the State's action against pharmaceutical manufacturers. Purdue Pharma L.P. v. State, 256 So. 3d 1, 2018 Miss. LEXIS 415 (Miss. 2018).

As the United States Supreme Court has held, interpreting the venue statute to allow a foreign corporation to have only one principal place of business promotes simplicity and avoids complex litigation. Principal place of business is a singular reference to a corporation's nerve center. Having multiple principal places of business nationally as well as in each state does not logically promote the term principal place. The statute refers to a corporation's principal place of business and not to its principal places of business. The term place is singular, which indicates that there can be only one. The plain language of the statute reads if venue in a civil action against a nonresident defendant cannot be asserted a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled. Miss. Code Ann. § 11-11-3(1)(b). Smith v. Kan. City Southern Ry. Co., 214 So. 3d 272, 2017 Miss. LEXIS 119 (Miss. 2017).

Supreme Court of Mississippi finds that a corporation may have only one principal place of business. Holding that the Legislature intended the venue statute to apply to a corporation's principal place of business inside Mississippi would require analyzing in each case how much of a presence a foreign business has to have in Mississippi to have a principal place of business both inside Mississippi and nationally. Additionally, if any business with an office in Mississippi can be considered to have a principal place of business inside the state, that interpretation would render Miss. Code Ann. § 11-11-3(1)(b) venue in the county of the plaintiff's residence or domicile, virtually irrelevant. If the Legislature had intended for a foreign corporation to have a principal place of business inside the state, it easily could have clearly stated that in the statute. Smith v. Kan. City Southern Ry. Co., 214 So. 3d 272, 2017 Miss. LEXIS 119 (Miss. 2017).

Parent company of an alcohol permit holder should have been dismissed from a personal injury case because it was not liable under Miss. Code Ann. § 67-1-83 since it was not a permit holder itself or an employee of such; moreover, the pleadings did not adequately state a claim showing that the corporate veil should have been pierced. Penn Nat'l Gaming, Inc. v. Ratliff, 954 So. 2d 427, 2007 Miss. LEXIS 229 (Miss. 2007).

Because parent company was a foreign corporation with its principal place of business in Pennsylvania, the only place where it could be said to reside in Mississippi was where an agent for service of process may be found; thus, because the family failed to plead fact sufficient to state a claim against the parent company, their claim was unreasonable and the trial court erred in denying the motion to transfer venue, as there was no reasonable basis to keep the parent company in the suit. Penn Nat'l Gaming v. Ratliff, 2007 Miss. LEXIS 1 (Miss. Jan. 4, 2007), op. withdrawn, sub. op., 954 So. 2d 427, 2007 Miss. LEXIS 229 (Miss. 2007).

Where an accident occurred in Jefferson County, the insured, a Jefferson County resident, had purchased insurance from an agency located in Adams County, but the book of insurance and the agency were transferred to a different agent, in Warren County, and the insurer's registered agent for process was in Rankin County, and but for the accident in Jefferson County, no injury would have occurred and no suit would have been filed. While venue was not improper in the other counties, and while the action was for fraudulent and negligent misrepresentation and bad faith, the trial court erred in concluding that venue was not proper in Jefferson County as a substantial component of the claim, personal injury and property damage, occurred there. Snyder v. Logan, 905 So. 2d 531, 2005 Miss. LEXIS 4 (Miss. 2005).

In a proceeding upon attachment in chancery to recover for injuries received and to attach nonresident corporate defendant's funds and property at the hands of Mississippi corporation, which operated a motor transportation line in Winston County, and a person residing in Choctaw County, although another defendant resided in Hinds County venue was properly laid in Winston County. Continental Southern Lines, Inc. v. Wicker, 217 Miss. 856, 65 So. 2d 272, 1953 Miss. LEXIS 501 (Miss. 1953).

This section [Code 1942, § 1433] applies to foreign corporations who are subject to the same rights and disabilities as to venue as are domestic corporations. Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So. 2d 78, 1952 Miss. LEXIS 491 (Miss. 1952).

In an action to recover damages for breach of contract to furnish and install an ice cream freezing unit, the cause of action against a foreign corporation authorized to do business in the state accrued in the county in which the failure to install the unit occurred and therefore the venue was fixed there. Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So. 2d 78, 1952 Miss. LEXIS 491 (Miss. 1952).

A foreign corporation, which has appointed a resident agent, is subject to the same rights and disabilities as to venue as are domestic corporations. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

Suit by domestic corporation against foreign corporation for breach of contract to buy piling, in procuring piling from subproducers in another state, thus preventing delivery by plaintiff, could not be brought in county of plaintiff's domicile but only in county of defendant's domicile, since cause of action, if any, occurred or accrued without the state. McLeod Lumber Co. v. Manassa Timber Co., 180 Miss. 552, 178 So. 83, 1938 Miss. LEXIS 16 (Miss. 1938).

Foreign corporation designating resident agent could be sued in circuit court of county where transitory cause of action accrued. Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887, 1930 Miss. LEXIS 353 (Miss. 1930).

Foreign corporation designating resident agent is placed, as regards venue in transitory action, in same position as domestic corporation. Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887, 1930 Miss. LEXIS 353 (Miss. 1930).

Mortgagor may sue for relief against sales of mortgaged property contrary to agreement in county where general agent of nonresident insurance company whose policy was assigned to mortgagees is found; and his bill for relief in such case is not multifarious for joining insurance company. Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874, 1927 Miss. LEXIS 280 (Miss. 1927).

A foreign corporation may be found in any county in which it has an agent upon whom process can be served. Dean v. Brannon, 139 Miss. 312, 104 So. 173, 1925 Miss. LEXIS 160 (Miss. 1925).

9. Municipal corporations.

This section [Code 1942, § 1433] does not apply to a municipality. City of Jackson v. Wallace, 189 Miss. 252, 196 So. 223, 1940 Miss. LEXIS 104 (Miss. 1940).

A suit for personal injuries against a power company and a municipality, brought in a county where the power company had a power line but not in the county of the municipality's domicil, could not be maintained against the municipality in such county. City of Jackson v. Wallace, 189 Miss. 252, 196 So. 223, 1940 Miss. LEXIS 104 (Miss. 1940).

10. Actions relating to land; ejectment, etc.

Where the plaintiff alleged an actual physical invasion of the subject property in a "nuisance" cause of action, the action was actually one for trespass to realty and was thus subject to the local action doctrine. Donald v. AMOCO Prod. Co., 735 So. 2d 161, 1999 Miss. LEXIS 125 (Miss. 1999).

Statute recognizes only 3 categories of "local" actions: actions of trespass on land; ejectment proceedings; and actions for statutory penalty for cutting and boxing trees and firing woods. Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1992 U.S. App. LEXIS 569 (5th Cir. Miss. 1992).

Action by building owner to recover cost of asbestos abatement program against company which designed and manufactured fire-proofing materials that contained asbestos which were installed in building owned by plaintiff does not fall within any of 3 categories of "local" action (trespass on land; ejectment; cutting and boxing trees and firing woods), thus was not local action under Mississippi law, and courts in Mississippi, including Federal District Court, properly could exercise jurisdiction over it. Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1992 U.S. App. LEXIS 569 (5th Cir. Miss. 1992).

Where defendants resided in another county, an action for value of timber cut was properly laid in county in which land was situated. Bassett v. Stringer, 216 Miss. 766, 63 So. 2d 234, 1953 Miss. LEXIS 692 (Miss. 1953).

Where suit to recover the value of trees cut and removed from plaintiff's land and the statutory penalty therefor was brought in the wrong county and it was transferred to the proper county and received by the clerk thereof, and plaintiff was not a nonresident nor was she shown to have been insolvent, it was the duty of the clerk of court of the latter county to enter the cause on his dockets as if it had been commenced in such court without requiring security for costs, his only right to obtain security for cost being that prescribed by law after commencement of suit. Neely v. Martin, 193 Miss. 856, 11 So. 2d 435, 1943 Miss. LEXIS 13 (Miss. 1943).

Action for trespass on land is not a "transitory action." Sharp v. Learned, 182 Miss. 333, 181 So. 142, 1938 Miss. LEXIS 168 (Miss. 1938).

An action is not "an action of trespass on land" within meaning of the statute unless there exist the elements of force and entry necessary to constitute the common-law action of quare clausum fregit. Archibald v. Mississippi & T. R. Co., 66 Miss. 424, 6 So. 238, 1889 Miss. LEXIS 120 (Miss. 1889).

Ejectment and trespass quare clausum fregit are the only ordinary actions which can be brought in a county where the defendant does not reside and is not found. Elder v. Hilzheim & Anderson, 35 Miss. 231, 1858 Miss. LEXIS 33 (Miss. 1858); Archibald v. Mississippi & T. R. Co., 66 Miss. 424, 6 So. 238, 1889 Miss. LEXIS 120 (Miss. 1889).

11. —Land located in two or more counties.

Venue of action for setting fire to grass on defendants' land in two counties and burning bridge on road in J. county held in L. county where defendants resided. Jefferson Davis County v. Riley, 158 Miss. 473, 129 So. 324, 1930 Miss. LEXIS 14 (Miss. 1930).

In a suit for trespass on lands lying in two counties and the defendant resides in one of the counties, suit must be brought in the county of defendant's residence. Kraus v. Stewart, 122 Miss. 503, 84 So. 463, 1920 Miss. LEXIS 450 (Miss. 1920).

12. Change of venue in general.

Since a chancery court erred in relying upon facts to support its denial of a motion to transfer venue which, even if taken as true, were neither alleged in the complaint nor supported by cognizable evidence, it improperly denied a motion to transfer venue. Wilkerson v. Goss, 113 So. 3d 544, 2013 Miss. LEXIS 294 (Miss. 2013).

In a medical malpractice/wrongful death action, the trial court properly denied one physician's motion to change venue because under Miss. Code Ann. § 11-11-3, venue was proper in the county in which the parents filed their action, as that was the county in which their son died. Bullock v. Lott, 964 So. 2d 1119, 2007 Miss. LEXIS 521 (Miss. 2007).

Factual basis on which the patient and husband based their medical malpractice claim against Jefferson County Hospital failed to evidence a causal connection between the hospital's alleged negligence and the patient's injury; therefore, the circuit court erred in denying the healthcare providers' and physician's motion to transfer venue to Warren County under Miss. Code Ann. § 11-11-3. Austin v. Wells, 919 So. 2d 961, 2006 Miss. LEXIS 47 (Miss. 2006).

Miss. Code Ann. § 11-11-3 was not designed to remove a resident defendant's right to be sued in his or her own county of residence as the Legislature never intended an interpretation of the venue statutes that would allow a resident defendant to be sued in the plaintiff's county of residence simply because a nonresident defendant was joined in the same suit; the hospital was a Mississippi corporation with its principal place of business in De Soto County and the patient was treated at the hospital in De Soto County when he received the alleged negligent care and treatment; therefore, venue was proper in De Soto County and should have been transferred to that county. Baptist Mem. Hospital-Desoto, Inc. v. Bailey, 919 So. 2d 1, 2005 Miss. LEXIS 362 (Miss. 2005).

Trial court erred in denying defendants' motion for a change of venue pursuant to Miss. Code Ann. § 11-11-3 in the injured motorist's action because the motorist's co-worker was fraudulently joined as a defendant to obtain venue in Smith County. The motorist's exclusive remedy against the co-worker was for workers' compensation benefits as provided under Miss. Code Ann. § 71-3-9, which extended immunity to co-workers as well as employers. Christian v. McDonald, 907 So. 2d 286, 2005 Miss. LEXIS 115 (Miss. 2005).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, said companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation will be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550, 2004 Miss. LEXIS 1197 (Miss. 2004).

In an open accounts collection case, venue was proper in either Jones County or Pike County, Mississippi. Workers from the welding company, which sought monies owed, were dispatched from its Jones County offices to work at the drilling company's oil well site in Pike county, based upon orders that were placed via telephone from Pike County to Jones County, some charges were in fact incurred in Jones County, such as employees' travel time, and the welding company had expected payment in Jones County; thus, the drilling company's motion for a change of venue to Pike County was properly denied. Braswell v. T & T Welding, Inc., 883 So. 2d 82, 2004 Miss. LEXIS 1026 (Miss. 2004).

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., where the general hospital was entitled to venue in the county in which the principal offices were located, Miss. Code Ann. § 11-11-3(1), because the decedent's heirs failed to assert a reasonable claim of liability against the medical center and treating physicians. Wayne Gen. Hosp. v. Hayes, 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. Wayne Gen. Hosp. v. Hayes, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

On a motion for a change of venue, it was a question of fact for the circuit court as to whether the defendant was a resident of Covington or Jasper Counties. Buckley v. Guilbert, 250 Miss. 240, 164 So. 2d 743, 1964 Miss. LEXIS 459 (Miss. 1964).

Since a corporation is not entitled to file a motion for change of venue, the circuit court correctly refused to change the venue in a replevin action upon the sole motion of the corporation. Ainsworth v. Blakeney, 232 Miss. 297, 98 So. 2d 880, 1957 Miss. LEXIS 476 (Miss. 1957).

Where an action was brought against the administrator of an estate and two other defendants within four days after the administrator was issued letters, but the administrator did not object that the action was prematurely brought, the codefendants of the administrator could not, on a motion for change of venue, raise the question. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

In a death action arising out of a motor vehicle collision, defendants' motion for a change of venue, which charged that the plaintiff had failed to show any negligence on the part of the decedent so that the sole purpose of joining the administrator of decedent's estate was to destroy the venue rights of the defendants, was properly overruled since defendants had denied negligence and had affirmatively alleged that decedent's negligence was the sole proximate cause of the collision, they could not, without changing their position, withhold their evidence to establish decedent's negligence, and thus nullify the proceedings by change of venue, and because plaintiff's evidence had made a jury case as to the decedent's negligence. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

Action of attorneys for plaintiff, who had a cause of action arising out of a motor vehicle collision, in actively participating in securing the appointment of another as administrator of decedent's estate in order that the action against the decedent's estate might be brought in Simpson County and thus draw two other codefendants into the circuit court of that county was not improper, in the absence of a fraudulent agreement between plaintiff's attorneys and the administrator, so that the codefendant's motion for a change of venue was properly denied. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

Where an automobile collision occurred in one county and the two defendants resided in another county, the plaintiff had the option of bringing suit either in the county where the accident occurred or in the county where the defendants resided and the venue could not be changed upon the application of either defendant since it appeared that both defendants were material parties, that there was a valid cause of action against both and that neither was fraudulently joined for the purpose of fixing the venue. F. B. Walker & Sons, Inc. v. Rose, 223 Miss. 494, 78 So. 2d 592, 1955 Miss. LEXIS 405 (Miss. 1955).

Fourteen-year-old boy who agreed to warn driver of farm tractor on highway of approaching traffic was not a real party to an action brought in the county of the boy's residence against the boy and the driver and owners, who resided in another county, of a truck which collided with the tractor, for the death of the driver of the tractor, since the boy could not be held liable in tort for failure to have given such warning, and therefore motion by the nonresident defendants for change of venue to the county of their residence should have been granted. Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

Defendant, a traveling salesman for a foreign corporation, who was unmarried and had no home or fixed place of residence in the state, but often stayed at a hotel in Biloxi as a place of rest and relaxation, was not entitled to have suit against him for personal injuries transferred from Jefferson Davis county, where accident had occurred and process was served, to Harrison county. Knower v. Baldwin, 195 Miss. 166, 15 So. 2d 47, 1943 Miss. LEXIS 137 (Miss. 1943).

In libel action against newspaper publishing company in Sunflower County, action was properly dismissed without prejudice where cause of action arose in Hinds County where defendant corporation was domiciled, since there is no authority to change the venue of such suit against the corporation to Hinds County. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

The venue in a civil action should be changed on request of the party entitled thereto whenever the condition therefor arises. Howard v. Ware, 192 Miss. 36, 3 So. 2d 830, 1941 Miss. LEXIS 1 (Miss. 1941); Long v. Patterson, 198 Miss. 554, 22 So. 2d 490, 1945 Miss. LEXIS 229 (Miss. 1945).

A defendant's request for a change of venue to the county of her residence, which would have been the proper venue but for the joinder of a codefendant, should be granted when the plaintiff rests his case without attempting to prove liability on the part of the codefendant. Howard v. Ware, 192 Miss. 36, 3 So. 2d 830, 1941 Miss. LEXIS 1 (Miss. 1941).

That the court permitted a judgment against a codefendant, notwithstanding the fact that the plaintiff rested without any attempt to establish liability on its part, does not deprive the defendant of a right to a change of venue at that stage of the case to the county of her residence, which would have been the proper venue but for the joinder of the codefendant. Howard v. Ware, 192 Miss. 36, 3 So. 2d 830, 1941 Miss. LEXIS 1 (Miss. 1941).

A motion by a defendant, in an action against him for personal injury suffered when a wooden awning attached to his building and extending over the sidewalk fell upon the plaintiff, to change the venue of the action from Forrest County to Lamar County, the residence of the defendant, on the ground that a municipality was fraudulently joined as a defendant to the suit for the purpose of depriving the defendant of his right under this section to have the case tried in Lamar County, was properly overruled where the court had not yet determined whether a municipality was charged with the duty of exercising reasonable care to prevent the awning from falling and injuring persons using the sidewalk. Weems v. Lee, 185 Miss. 98, 187 So. 531, 1939 Miss. LEXIS 141 (Miss. 1939).

In employee's action against foreign corporation brought in county in which corporation had its business localized, defendant held not entitled to change venue to county of principal office; "found" defined. Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74, 1929 Miss. LEXIS 264 (Miss. 1929).

Law authorizing change of venue held inapplicable to suits pending at time of enactment. State use of Thompson v. Cloud, 146 Miss. 642, 112 So. 19, 1927 Miss. LEXIS 237 (Miss. 1927); Strickland v. Busby, 146 Miss. 649, 111 So. 133, 1927 Miss. LEXIS 173 (Miss. 1927).

Venue of suit in county of office of nonresident corporation, necessary defendant, will not be changed because citizen of another county is party thereto. Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874, 1927 Miss. LEXIS 280 (Miss. 1927).

The state may provide different rules as to venue between citizens and corporations provided such rule does not materially affect the liability of the defendant, and the provision with reference to change of venue to the county of the defendant's residence applies only to citizens. Morrimac Veneer Co.V McCalip, 129 Miss. 671, 92 So. 817, 1922 Miss. LEXIS 80 (Miss. 1922).

The statute in so far as it provides for a change of venue in the case of a resident citizen but denies the right to a corporation does not violate the equal protection clause of the 14th Amendment. Morrimac

Veneer Co.V McCalip, 129 Miss. 671, 92 So. 817, 1922 Miss. LEXIS 80 (Miss. 1922).

It was error to refuse a change of venue as to an action, not local, in which defendant was served with process from a county other than that of his residence. Cook v. Pitts, 114 Miss. 39, 74 So. 777, 1917 Miss. LEXIS 9 (Miss. 1917).

The right to a change of venue is not accorded a corporation. Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907, 1916 Miss. LEXIS 360 (Miss. 1916); Morrimac Veneer Co.V McCalip, 129 Miss. 671, 92 So. 817, 1922 Miss. LEXIS 80 (Miss. 1922); Nicholson v. Gulf, M. & N. R. Co., 177 Miss. 844, 172 So. 306, 1937 Miss. LEXIS 168 (Miss. 1937).

If the party entitled to a change of venue fails to apply therefor, the court may render judgment. Christian v. O'Neal, 46 Miss. 669, 1872 Miss. LEXIS 36 (Miss. 1872); Cain v. Simpson, 53 Miss. 521, 1876 Miss. LEXIS 107 (Miss. 1876).

The rule as to change of venue applies to an executor or administrator. McLeod v. Shelton & Minor, 42 Miss. 517, 1869 Miss. LEXIS 26 (Miss. 1869).

13. —Public officers.

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicil, where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. Birdsong v. Grubbs, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

A mandamus action by a county to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison Counties, which had been taken over by the highway commission and made a part of United States Highway 90, was properly transferred to Hinds County, in which the commission had its permanent office. State ex rel. Cowan v. State Highway Com., 195 Miss. 657, 13 So. 2d 614, 1943 Miss. LEXIS 120 (Miss. 1943).

In action to recover damages for alleged tort against a sheriff (a nonresident of the county), his surety, a nonresident corporation, and certain resident garnishee defendants, the defendants were entitled to have the venue changed to the county of the sheriff's residence, in view of the statute providing for the change of venue of an action against a public officer to the county of his residence upon his application, notwithstanding another provision that "all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be bound." Holyfield v. State, 194 Miss. 91, 10 So. 2d 841, 1942 Miss. LEXIS 165 (Miss. 1942).

Purpose of 1926 amendment to venue statute giving public officer sued out of county of his residence the right to have venue changed to county of his residence was to guarantee to public officer the right to remove suit to county of his residence, notwithstanding that surety on his official bond might be found doing business in county where suit was originally filed. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

Statute giving public officer sued out of county of his residence the right to have venue changed to county of his residence held not to prevent full operation of statute providing for change of venue, or to confer any different right from that granted to any other Mississippi citizen sued on nonlocal action out of county of his residence. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

Change of venue of action for wrongful killing by deputy sheriffs, to county other than county of deputy sheriffs' residence, held not error. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

Motion in justice court from which execution issued and circuit court to which cause was appealed to charge sheriff of another county and surety with sheriff's failure to levy execution could not be transferred to circuit court of county of sheriff's residence. Womack v. Richardson, 168 Miss. 347, 151 So. 173, 1933 Miss. LEXIS 209 (Miss. 1933).

Corporation or individual jointly sued with another in county in which joint defendant may be found cannot change venue to county of residence; statute authorizing change of venue to county of defendant's residence, notwithstanding codefendant is subject to action in county, held applicable only to public officer; statute authorizing change of venue to county of defendant public officer's residence, notwithstanding joinder of codefendant subject to action in county, held not discriminatory. Pan-American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480, 1930 Miss. LEXIS 238 (Miss. 1930), overruled, Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541, 1951 Miss. LEXIS 458 (Miss. 1951).

Statute held not to warrant change of venue to county of public officer's residence in cause pending at its passage. State use of Thompson v. Cloud, 146 Miss. 642, 112 So. 19, 1927 Miss. LEXIS 237 (Miss. 1927).

Motions against sheriffs for failure to return executions are determinable in the court to which the execution is returnable, and a change of venue will not be granted to the county of the officer's residence. Cox v. Ross, 56 Miss. 481, 1879 Miss. LEXIS 148 (Miss. 1879).

14. —Proceedings in rem.

Purchaser held not entitled to removal of proceeding to enforce purchase money lien on automobile seized in county of seller's residence. Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534, 1928 Miss. LEXIS 298 (Miss. 1928).

The statute for change of venue does not apply in favor of a defendant in attachment brought in a county other than that of his residence, where jurisdiction has been secured by a levy on effects or debts of the defendant. Smith v. Mulhern, 57 Miss. 591, 1880 Miss. LEXIS 7 (Miss. 1880).

15. —Consent, effect of.

A suit in trespass quare clausum fregit cannot be removed by consent from one county to another. Wilkinson v. Jenkins, 77 Miss. 603, 27 So. 611 (Miss. 1900).

16. —Waiver.

Because the doctors waited three years to pursue their motion contesting venue under former Miss. Code Ann. § 11-11-3, and in doing so, waiting until two weeks before the date set for trial, they waived their right to contest venue. Fredericks v. Malouf, 2011 Miss. LEXIS 131 (Miss. Mar. 3, 2011).

Where timely objection was not made, as specifically required by Code 1942, § 1433, venue was waived. Wofford v. Cities Service Oil Co., 236 So. 2d 743, 1970 Miss. LEXIS 1499 (Miss. 1970).

A defendant's plea to the merits after the overruling of her motion for a change of venue to the county of her residence does not waive her right to the change. Howard v. Ware, 192 Miss. 36, 3 So. 2d 830, 1941 Miss. LEXIS 1 (Miss. 1941).

17. —Burden of proof.

A defendant seeking change of venue to the county of her residence, notwithstanding the joinder of a codefendant against whom, it was claimed, the plaintiff had no cause of action, had the burden of negativing the plaintiff's allegations in that regard. Howard v. Ware, 192 Miss. 36, 3 So. 2d 830, 1941 Miss. LEXIS 1 (Miss. 1941).

18. Illustrative cases.

Neither of the first two venue options under the statute was applicable because no defendant resided in Mississippi, and since plaintiffs alleged that the defects that were designed into, manufactured, shipped, and sold to a limited liability company for their use occurred in Tennessee and Alabama, the third option under the venue statute also was not applicable; however, the accident that occurred in Laurel, MS, was a substantial event that caused injury and was therefore a permissible venue. Since a permissible venue existed, it was not proper for plaintiffs to select the county of residence of one of the beneficiary plaintiffs. Herman Grant Co. v. Washington, 214 So. 3d 266, 2017 Miss. LEXIS 122 (Miss. 2017).

RESEARCH REFERENCES

ALR.

Lien as estate or interest in land within venue statute. 2 A.L.R.2d 1261.

Relationship between "residence" and "domicil" under venue statutes. 12 A.L.R.2d 757.

Venue of action for cutting, destruction, or damage of standing timber. 65 A.L.R.2d 1268.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.

Place where corporation is doing business for purposes of state venue statute. 42 A.L.R.5th 221.

Venue of wrongful-death action. 58 A.L.R.5th 535.

Applicability of 28 USCS § 1391(e), providing for venue and process in civil suit against federal officer or employee for official conduct, to officer or employee no longer in government service or no longer serving government in capacity in which he acted. 48 A.L.R. Fed. 436.

What is the judicial district "in which the claim arose" for venue purposes under 28 USCS § 1391(a) and (b). 59 A.L.R. Fed. 320.

Am. Jur.

77 Am. Jur. 2d, Venue §§ 24 et seq., 26, 32 et seq.

CJS.

92A C.J.S., Venue §§ 75 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi – Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L.J. 49, March, 1985.

Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy, 22 Miss. C. L. Rev. 9, Fall, 2002.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Practice References.

4 Am Law Prod Liab 3d, Venue; Forum Non Conveniens § 49:1.

§§ 11-11-5 and 11-11-7. Repealed.

Repealed by Laws, 2002, 3rd Ex. Sess., ch. 4, § 2, eff from and after passage (approved January 1, 2003).

11-11-5. [Codes, 1871, § 2410; 1880, § 1499; 1892, § 651; 1906, 708; Hemingway's 1917, § 487; 1930, § 496; 1942, § 1434; Laws, 1926, ch. 148; 1930, ch. 121; Laws, 1979, ch. 319, § 1; Laws, 1992, ch. 301, § 1, eff from and after July 1, 1992, and applicable only to causes of action accruing on or after July 1, 1992.]

11-11-7. [Codes, 1871, § 2410; 1880, § 1500; 1892, § 652; 1906, § 709; Hemingway's 1917, § 488; 1930, § 497; 1942, § 1435; Laws, 1916, ch. 201; Laws, 1971, ch. 349, § 1, eff from and after passage (approved March 12, 1971).]

Editor's Notes — Former § 11-11-5 set rule on venue for actions against railroad and other companies.

Former § 11-11-7 regulated actions against insurance companies.

§ 11-11-9. Actions against executors.

Executors, administrators or guardians, appointed in this state and residing out of it, may be sued in the county of their appointment and may be made parties to such suit so as to authorize judgment against them by publication of summons made as provided for in the case of absent and nonresident defendants.

Actions against resident executors, administrators or guardians may be brought in the county or judicial district of their appointment.

HISTORY: Codes, 1880, § 1520; 1892, § 653; 1906, § 710; Hemingway's 1917, § 489; 1930, § 498; 1942, § 1436; Laws, 1971, ch. 486, § 1, eff from and after passage (approved March 31, 1971).

Cross References — Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1436] applies where a nonresident executor, administrator, or guardian has to be summoned by publication. A suit will lie in any county where service of process may be had. Williams v. Stewart, 79 Miss. 46, 30 So. 1, 1901 Miss. LEXIS 27 (Miss. 1901).

RESEARCH REFERENCES

ALR.

Place of personal representative's appointment as venue of action against him in his official capacity. 93 A.L.R.2d 1199.

Capacity of guardian to sue or to be sued outside state where appointed. 94 A.L.R.2d 162.

Am. Jur.

77 Am. Jur. 2d, Venue § 21.

CJS.

92A C.J.S., Venue § 56.

§§ 11-11-11 and 11-11-13. Repealed.

Repealed by Laws, 2002, 3rd Ex. Sess., ch. 4, § 2, eff from and after passage (approved January 1, 2003).

§ 11-11-11. [Codes, 1942, § 1437; Laws, 1940, ch. 246; Laws, 1964, ch. 320, § 1; Laws, 1968, ch. 330, § 1; Laws, 1971, ch. 431, § 1, eff from and after passage (approved March 24, 1971).]

§ 11-11-13. [Codes, 1942, § 9352-61; Laws, 1938, chs. 148, 345; Laws, 1946, ch. 266, § 61; Laws, 1952, ch. 265, § 1; Laws, 1954, ch. 299, §§ 1, 2; Laws, 1958, ch. 262; Laws, 1964, ch. 376, §§ 1-4, eff from and after passage (approved April 22, 1964).]

Editor's Notes — Former § 11-11-11 regulated venue selection in actions for damages against nonresidents.

Former § 11-11-13 regulated venue selection in actions for damages against nonresident motorists.

RESEARCH REFERENCES

Law Reviews.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

§ 11-11-15. Actions against State Board of Health or State Board of Medical Licensure.

The venue of actions against the Mississippi State Board of Health wherein said board is a defendant, or the State Board of Medical Licensure wherein said board is a defendant, shall be in Hinds County.

HISTORY: Codes, 1942, § 7096-01; Laws, 1946, ch. 483, § 1; Laws, 1980, ch. 458, § 32, eff from and after July 1, 1980.

Cross References — State board of medical licensure, see § 73-43-1 et seq.
Venue, see Miss. R. Civ. P. 82.

§ 11-11-17. Where court has jurisdiction of subject matter but not venue.

Where an action is brought in any justice court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred, together with all prepaid costs remaining after the court in which the action was originally brought has deducted the costs incurred in that court, to the venue to which it belongs.

HISTORY: Codes, 1942, § 1441; Laws, 1940, ch. 233; Laws, 1981, ch. 471, § 3; Laws, 1982, ch. 423, § 3; Laws, 1989, ch. 404, § 1; Laws, 1991, ch. 573, § 23, eff from and after July 1, 1991.

Cross References — Civil jurisdiction of justice courts, see § 9-11-9.
Proper venue of civil actions in circuit court and transferred to proper venue, see § 11-11-3.
Jurisdiction of crimes generally, see § 99-11-1.
Venue of criminal offenses, see § 99-11-3.
Criminal jurisdiction of justice courts, see § 99-33-1.
Venue, see Miss. R. Civ. P. 82.
Rule governing change of venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

Trial court did not err by dismissing a football player's case without prejudice instead of transferring it to the appropriate venue pursuant to the statute because the statute was inapposite since it applied only to justice courts. Ramsey v. Auburn Univ., 191 So. 3d 102, 2016 Miss. LEXIS 82 (Miss. 2016).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, said companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550, 2004 Miss. LEXIS 1197 (Miss. 2004).

The chancery court of Hinds County should have transferred a separate maintenance suit to the Rankin County chancery court, even though the defendant was temporarily residing in Hinds County where he was found for the service of process, where the defendant owned a home in Rankin County which he still considered to be his residence, he was registered to vote and did vote in Rankin County, and he had a homestead exemption on a home in Rankin County; the mere fact that the defendant was not actually present in his home did not mean that it was not his residence. Dunn v. Dunn, 577 So. 2d 378, 1991 Miss. LEXIS 117 (Miss. 1991).

This section [Code 1942, § 1441] applies only where the trial court lacks venue jurisdiction; and does not require a change of venue to the county of the nonresident defendant upon dismissal of the suit, after a settlement, as against the resident defendant. New Biloxi Hospital, Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882, 1962 Miss. LEXIS 544 (Miss. 1962).

A suit for alimony pendente lite, separate maintenance, and attorneys' fees which was brought in Tate County, the residence of the wife, should have been transferred to the chancery court of Alcorn County, where the evidence established that the latter county was the residence of the husband and the husband had made timely objection to the venue. Trainum v. Trainum, 234 Miss. 448, 105 So. 2d 628, 1958 Miss. LEXIS 516 (Miss. 1958).

Where defendant in a replevin action not only submitted the jurisdiction of the court by participating in the trial, but also invoked the jurisdiction of the court by filing a counterclaim for damages, this constituted a waiver of any objection to the venue. King v. Ainsworth, 225 Miss. 248, 83 So. 2d 97, 1955 Miss. LEXIS 577 (Miss. 1955).

This is a general statute without application to the statutes on the special or particular subject of divorce. Stark v. Stark, 755 So. 2d 31, 1999 Miss. App. LEXIS 371 (Miss. Ct. App. 1999); Price v. Price, 202 Miss. 268, 32 So. 2d 124, 1947 Miss. LEXIS 270 (Miss. 1947); Cruse v. Cruse, 202 Miss. 497, 32 So. 2d 355, 1947 Miss. LEXIS 305 (Miss. 1947).

A mandamus action by a county to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison counties, which had been taken over by the highway commission and made a part of United States Highway 90, was properly transferred to Hinds County, in which the commission had its permanent office. State ex rel. Cowan v. State Highway Com., 195 Miss. 657, 13 So. 2d 614, 1943 Miss. LEXIS 120 (Miss. 1943).

OPINIONS OF THE ATTORNEY GENERAL

An individual may be instructed prior to filing an action that the county justice court might lack proper jurisdiction, but if the plaintiff still persists in filing the action in that court, the clerk should file the action and collect the proper fees; the justice court judge may, prior to issuing a summons, order the case dismissed for lack of jurisdiction and, in such a case, the plaintiff would not be entitled to his filing fee but would be entitled to refund of the constable's fee. Shirley, Nov. 16, 2001, A.G. Op. #01-0697.

RESEARCH REFERENCES

Am. Jur.
77 Am. Jur. 2d, Venue § 50.

Stipulation for action to be transferred to another county, 24 Am. Jur. Pl & Pr Forms (Rev), Venue, Form 222.

20 Am. Jur. Pl & Pr Forms, Venue, Form 20:1272 (Stipulation for action to be transferred to proper county).

CJS.
92A C.J.S., Venue §§ 141, 142, 144-180.

Law Reviews.
1985 Mississippi Supreme Court Review – Civil Procedure. 55 Miss. L. J. 755, December 1985.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi – Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

§ 11-11-19. Where brought if judge interested.

If the judge of the court be a party to or interested in any suit about to be commenced, the suit may be instituted in an adjacent district, and the process may be issued to and served in any county where the defendant may be found; or the suit may be brought as if the judge were not a party to or interested in it.

HISTORY: Codes, Hutchinson's 1848, ch. 58, art. 1 (173); 1857, ch. 61, art. 34; 1871, § 524; 1880, § 1501; 1892, § 654; 1906, § 711; Hemingway's 1917, § 490; 1930, § 499; 1942, § 1442.

Cross References — When judge must not preside on trial of cause, see § 9-1-11.
Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR.
Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

Am. Jur.
77 Am. Jur. 2d, Venue § 50.

CJS.
92A C.J.S., Venue §§ 161-168.

CHANGE OF VENUE

Sec.
11-11-51. Grounds for change of venue, generally.
11-11-53. Transmission of papers.
11-11-55. Receipt of papers and entry of cause.
11-11-57. Venue changed but once.
11-11-59. Applicability of provisions to districts in county.

§ 11-11-51. Grounds for change of venue, generally.

When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party. On reasonable notice in writing to the adverse party of the time and place of making the application, if made in vacation, the court, if in term time, or the judge in vacation, shall hear the parties and examine the evidence which either may adduce, and may award a change of venue to some convenient county where an impartial trial may be had, and, if practicable, in which the circuit court may next be held. If made in vacation, the order shall be indorsed on the petition and directed to the clerk, who shall file the same with the papers in the suit.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 2 (1); 1857, ch. 61, art. 122; 1871, § 719; 1880, § 1502; 1892, § 655; 1906, § 712; Hemingway's 1917, § 491; 1930, § 500; 1942, § 1443.

Cross References — Change of venue in jury cases in chancery court practice, see § 11-5-5.

Change of venue of garnishment proceedings, see § 11-35-49.

Change of venue in criminal prosecutions, see § 99-15-35.

Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Power and duty of court.
3. Specific grounds.
4. —Prejudice.
5. Forum non conveniens.
6. Other grounds.

1. In general.

While the state supreme court held that Miss. Code Ann. § 11-11-51 did not require a company to produce an affidavit from a county resident in its motion to change venue stating that the company could not receive a fair trial, the denial of the motion was affirmed as no evidence existed that the company could not receive a fair trial. Bayer Corp. v. Reed, 932 So. 2d 786, 2006 Miss. LEXIS 355 (Miss. 2006).

Petition for change of venue was not required to be signed by corporate defendant; signature of defendant's attorney was sufficient. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

Circuit Court acted within its lawful discretion in denying railroad's motion for change of venue; § 11-11-5 establishes that venue is proper in county in which plaintiff resides, and that was county where venue was set; grounds that railroad could not obtain fair trial in county where venue was set was rejected where railroad failed to show undue influence of adverse party or prejudice existing in public mind or some other reason. Maxwell v. Illinois C. G. Railroad, 513 So. 2d 901, 1987 Miss. LEXIS 2793 (Miss. 1987).

The purpose of this section [Code 1942, § 1443] is to guarantee the litigant's rights to a fair trial. Mississippi State

Highway Com. v. Rogers, 240 Miss. 529, 128 So. 2d 353, 1961 Miss. LEXIS 483 (Miss. 1961).

Change of venue statute was intended to provide method by which fair and impartial trial could be obtained whenever on account of undue influence of adverse party, prejudice in public mind, or other sufficient cause, a fair and impartial trial could not be obtained in county in which venue was originally fixed. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

Where a county is the defendant, this section [Code 1942, § 1443] equally applies. Humphreys County v. Cashin, 128 Miss. 236, 90 So. 888, 1922 Miss. LEXIS 106 (Miss. 1922).

The statute applies only to civil actions begun by ordinary summons and not to attachments. Baum v. Burnes, 66 Miss. 124, 5 So. 697, 1888 Miss. LEXIS 75 (Miss. 1888).

An affidavit for a change of venue is not a part of the record unless made so by bill of exceptions. Grant v. Planters' Bank, 5 Miss. 326, 1840 Miss. LEXIS 16 (Miss. 1840).

2. Power and duty of court.

Application for change of venue is addressed to discretion of trial judge, and ruling thereon will not be disturbed on appeal unless it clearly appears that there has been abuse of discretion or that discretion has not been justly and properly exercised under circumstances of case. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

Change of venue motion was timely even though it was filed nearly two years after commencement of action, where motion was filed three months before trial and was based in part on pretrial publicity. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

An application for change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal save for abuse of or failure to properly exercise discretion. Mississippi State Highway Com. v. Rogers, 240 Miss. 529, 128 So. 2d 353, 1961 Miss. LEXIS 483 (Miss. 1961).

Court should grant change of venue whenever conditions arise which, by virtue of change of venue statute, authorize change of venue. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

Where there is testimony supporting the judgment of the court ordering a change of venue he may grant such change. Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470, 1924 Miss. LEXIS 233 (Miss. 1924).

On an application for a change of venue in term-time, an order of court is necessary. Saunders v. Morse, 4 Miss. 101, 1838 Miss. LEXIS 22 (Miss. 1838).

3. Specific grounds.

4. —Prejudice.

In a negligence action, the subject newspaper was the primary newspaper in the county and also had a large circulation outside the county, and the front page article went into graphic detail, describing the mother's bleeding and her terror as she waited for emergency care and the article went on to allege that the hospital was responsible for the newborn child's severe brain damage. The article also explained specific acts of negligence, as claimed by the parents and cited the substance of certain deposition testimony given by hospital personnel; the appellate court held there existed a substantial likelihood of material prejudice against the hospital and that the trial court erred in denying its motion for a change of venue. River Oaks Health Sys. v. Steptoe-Finley, 2004 Miss. LEXIS 1503 (Miss. July 13, 2004).

In a products liability case arising from use of a prescription drug, the trial court abused its discretion by improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company sufficiently proved bias in the community of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 2004 Miss. LEXIS

494 (Miss. 2004), modified, 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

Paper mill presented sufficient evidence in form of affidavits, depositions, newspaper articles, videotapes of news stories, and other exhibits to support petition for change of venue on basis of excessive pretrial publicity and citizen bias created by large number of potential jurors involved in similar dioxin-related litigation against mill. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

The Highway Commission is entitled to a change in the venue of a proceeding to condemn property for highway purposes where two previous jury verdicts in the case, and verdicts in other cases in the county, had been set aside as excessive. Mississippi State Highway Com. v. Rogers, 240 Miss. 529, 128 So. 2d 353, 1961 Miss. LEXIS 483 (Miss. 1961).

Change of venue of action for wrongful killing by deputy sheriffs, to county other than county of deputy sheriffs' residence, held not error. Tucker v. Gurley, 176 Miss. 708, 170 So. 230, 1936 Miss. LEXIS 163 (Miss. 1936).

5. Forum non conveniens.

Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to a county of proper venue–i.e., Warren County–where the reason for the transfer was the inability to seat an impartial jury; Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Thus, it was not necessary to determine whether such a transfer would have been "convenient" pursuant to Miss. Code Ann. § 11-11-51. Namihira v. Bailey, 891 So. 2d 831, 2005 Miss. LEXIS 38 (Miss. 2005).

The application of intrastate forum non conveniens is invalid where the trial court is faced with a choice of venue between two Mississippi counties. Salts v. Gulf Nat'l Life Ins. Co., 743 So. 2d 371, 1999 Miss. LEXIS 261 (Miss. 1999).

6. Other grounds.

In an action for malicious damage to a physician's reputation, the defendant medical center and radiology clinic were not entitled to a change of venue to the county in which they were located where they argued that medical care in the county in which they were located would be crippled if they were forced to defend in county in which the plaintiff commenced the action and that they would be required to incur higher costs of obtaining the attendance of unwilling witnesses to testify since they failed to show bias under the statute and failed to prove that the plaintiff's choice of venue would have denied them a fair and impartial trial. Pisharodi v. Golden Triangle Regional Med. Ctr., 735 So. 2d 353, 1999 Miss. LEXIS 140 (Miss. 1999).

RESEARCH REFERENCES

ALR.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action. 10 A.L.R.4th 1046.

Construction and application of venue provisions of Miller Act (40 USCS § 270b(b)). 140 A.L.R. Fed. 615.

Am. Jur.

77 Am. Jur. 2d, Venue §§ 52, 53.

24 Am. Jur. Pl & Pr Forms (Rev), Venue Forms 251-257 (Change of venue to promote the convenience of witnesses and ends of justice).

24 Am. Jur. Pl & Pr Forms (Rev), Venue, Forms 241, 242 (Change of venue on grounds of disqualification, bias, or prejudice of trial judge).

24A Am. Jur. Pl & Pr Forms (Rev), Venue, Form 291.2 (Motion-For change of venue-To county where real property subject to litigation is located).

24 Am. Jur. Pl & Pr Forms (Rev), Venue, Forms 231-234 (Change of venue on grounds of inability to obtain fair trial).

20 Am. Jur. Pl & Pr Forms, Venue, Forms 20:1211-20:1224 (Demand for and notice of motion for change of venue).

3 Am. Jur. Trials, Selecting the Forum-Defendant's Position, §§ 19, 20.

CJS.

92A C.J.S., Venue §§ 169-176, 203, 213, 216, 218.

§ 11-11-53. Transmission of papers.

(1) When an order for a change of venue shall be made, the clerk shall make out a descriptive list of all the papers in the cause and a certified copy of all orders and judgments made therein, with their dates, and a bill of the costs that have accrued. The said clerk shall carefully and safely put all the papers, with a copy of the descriptive list, and a copy of the orders and judgments, and the bill of costs, into a package, to be well covered and sealed up, and directed to the clerk of the court in which the suit is ordered removed. The clerk shall, if not otherwise directed by the judge, take the receipt of the party obtaining the change of venue for the papers contained on said list, and deliver the package to said party, to be carried to the clerk of the court to whom it may be directed, or it may be sent by mail, postage paid, or by express, the clerk taking proper receipt therefor.

(2) In Harrison County, a county having two judicial districts, in all civil proceedings, or matters, where the venue thereof shall be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, shall be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer shall be made.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 2 (4); 1857, ch. 61, art. 123; 1871, § 720; 1880, § 1503; 1892, § 656; 1906, § 713; Hemingway's 1917, § 492; 1930, § 501; 1942, §§ 1444, 2910-18; Laws, 1962, ch. 257, § 18, eff from and after passage (approved June 1, 1962).

Cross References — Another section derived from same 1942 code section, see § 99-11-39.

Transmission of papers and the like following an order changing the venue in a criminal case, see § 99-15-37.

Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Am. Jur.

77 Am. Jur. 2d, Venue § 60.

CJS.

92A C.J.S., Venue §§ 282, 298–300.

§ 11-11-55. Receipt of papers and entry of cause.

The clerk to whom the papers may be transmitted shall open the package and compare the papers with the descriptive list, and shall give the person delivering the same, if demanded, a receipt therefor. He shall then enter the cause on his docket as if it had been commenced in the court of which he is clerk, and issue subpoena for witnesses as in other cases.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 2 (5); 1857, ch. 61, art. 124; 1871, § 721; 1880, § 1504; 1892, § 657; 1906, § 714; Hemingway's 1917, § 493; 1930, § 502; 1942, § 1445.

Cross References — Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

Where action, brought in wrong county, was transferred to the proper county, the clerk of court of the latter county was without the right to refuse to docket the cause until security for costs had been given, where plaintiff was not a nonresident and was not shown to be insolvent, the clerk's right to obtain security for cost in such case being limited to that prescribed as to suit already commenced. Neely v. Martin, 193 Miss. 856, 11 So. 2d 435, 1943 Miss. LEXIS 13 (Miss. 1943).

RESEARCH REFERENCES

ALR.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Am. Jur.

77 Am. Jur. 2d, Venue § 60.

CJS.

92A C.J.S., Venue §§ 282, 298–300.

§ 11-11-57. Venue changed but once.

A civil suit shall not be removed more than once, or in any other manner than as prescribed, and in no case where it shall appear that there has been unnecessary delay or negligence in making the application.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 2 (6); 1857, ch. 61, art. 125; 1871, § 722; 1880, § 1505; 1892, § 658; 1906, § 715; Hemingway's 1917, § 494; 1930, § 503; 1942, § 1446.

Cross References — Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. Change of venue.

In a products liability case arising from use of a prescription drug, the trial court abused its discretion by improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company had sufficiently proved bias in the community of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 2004 Miss. LEXIS 494 (Miss. 2004), modified, 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

RESEARCH REFERENCES

ALR.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

When does period for filing petition for removal of civil action from state court to federal district court begin to run under 28 USCS § 1446(b). 139 A.L.R. Fed. 331.

Am. Jur.

77 Am. Jur. 2d, Venue § 46.

CJS.

92A C.J.S., Venue §§ 152, 280, 281, 302 et seq.

§ 11-11-59. Applicability of provisions to districts in county.

The provisions for a change of venue shall be applied in those counties where there are two places of holding circuit courts in the same manner as if each district were a separate county.

HISTORY: Codes, 1871, § 723; 1880, § 1506; 1892, § 659; 1906, § 716; Hemingway's 1917, § 495; 1930, § 504; 1942, § 1447.

Cross References — Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

CHAPTER 13.

INJUNCTIONS

Sec.
11-13-1. Evidence of complainant's equity and of truth of allegations required.
11-13-3. Security required to stay proceedings at law.
11-13-5. Bond when injunction is not to stay proceedings at law.
11-13-7. Bonds in particular cases.
11-13-9. Bond not required of state, county, municipality.
11-13-11. Restraint on collection of taxes.
11-13-13. Security required to enjoin collection of taxes.
11-13-15. Procedure for injunction of the collection of taxes.
11-13-17. Dissolution or modification of injunction of tax collection; general powers.
11-13-19. Chancellor may order return of personal property; execution.
11-13-21. Return of personal property; other causes.
11-13-23 through 11-13-29. Repealed.
11-13-31. Motion to dissolve injunction; affidavits; evidence.
11-13-33. Injunction bond as judgment.
11-13-35. Damages on dissolution of certain injunctions.
11-13-37. Post-injuction damages.
11-13-39. Effect of dissolution of injunction on bill of complaint.
11-13-41. Victims of stalking and sexual assault exempt from payment of fees related to filing for injunctive relief.

§ 11-13-1. Evidence of complainant's equity and of truth of allegations required.

An injunction shall not be granted unless the judge or chancellor shall be satisfied of the complainant's equity and of the truth of the allegations of the bill, by oath or other means.

HISTORY: Codes, 1857, ch. 62, art. 64; 1871, § 1043; 1880, § 1903; 1892, § 557; 1906, § 608; Hemingway's 1917, § 368; 1930, § 415; 1942, § 1335.

Cross References — Power of courts to grant injunctions, see § 9-1-19.
Authority of the court to punish for violation of injunction, see § 9-5-87.
Injunction to prohibit the selling of tobacco, see § 27-69-61.
Injunction to prohibit the operation of a rendering plant, see § 41-51-33.
Injunction to prohibit unlicensed practice of profession, see §§ 73-51-1, 73-51-3, 73-51-5.
Restraining wrongful disposition of collateral by secured party under Uniform Commercial Code, see § 75-9-507.
Injunction for violation of weights and measures law of 1964, see § 75-27-61.
Injunction against certain violations of the business tender offer law, see § 75-72-119.
Injunctive remedy for violations relating to legal expense insurance plans, see § 83-49-31.
Injunctions, see Miss. R. Civ. P. 65.
Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. Right to and propriety of injunction in general.
2. —Existence and adequacy of other remedies.
3. —Irreparable injury.
4. —Multiplicity of suits.
5. —Laches.
6. Mandatory injunction.
7. Temporary injunction.
8. Restraining order.
9. Persons entitled to relief.
10. Subjects of injunctive relief.
11. —Property rights.
12. —Elections.
13. —Nuisances.
14. —Taxes.
15. —Criminal prosecutions.
16. —Miscellaneous.
17. Pleading.
18. Judgment or decree.

1. Right to and propriety of injunction in general.

State court may prevent resident under its jurisdiction from doing inequity by maintaining federal court suit in distant jurisdiction when convenient and suitable forum is at resident's doorstep if matter of venue is not covered by act of Congress. Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

Neither Norris-LaGuardia Act, 29 USCS § 101, nor National Labor Relations Act, 29 USCS § 151, prohibits institution by employer involved in labor dispute of proceeding in state court for injunction against unlawful acts of labor unions and their members. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Sureties on tenant's replevin bond cannot enjoin judgment thereon in landlord's favor, where they have acquired the agricultural products subject to landlord's claim for rent and make no offer to pay him, even if the judgment be void, as "he who seeks equity must do equity." Walker-Durr Co. v. Mitchell, 97 Miss. 231, 52 So. 583, 1910 Miss. LEXIS 248 (Miss. 1910).

Rights already lost and wrongs already committed cannot be enjoined. McDaniel v. Hurt, 92 Miss. 197, 41 So. 381, 190 Miss. LEXIS 3 (Miss. 1906).

One seeking relief by injunction against a judgment at law rendered without notice, must show not only that the judgment was void but that he has a good defense to the suit. Newman v. Taylor, 69 Miss. 670, 13 So. 831, 1892 Miss. LEXIS 41 (Miss. 1892).

2. —Existence and adequacy of other remedies.

Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised; an injunction will not issue when the complainants have a complete and adequate remedy by appeal. Thus, a county supervisor's request for injunctive relief from the board of supervisor's ruling that the county supervisor was no longer a resident of the electing district and declaring the office vacant, was properly denied since the statutory method of appeal to the circuit court under § 11-51-75 afforded the county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right. Moore v. Sanders, 558 So. 2d 1383, 1990 Miss. LEXIS 154 (Miss. 1990).

In an action to enjoin the use of defendant's house as a beauty parlor, allegedly in violation of a protective covenant, it was no defense that the plaintiffs had not exhausted their administrative remedies in that they had not followed their prior objection to the defendant's successful application to the county board of supervisors for a use permit to its ultimate disposition, since the litigation arose from personal rights derived from a protective covenant, and a county board of supervisors is without authority, by the issuance of a use permit, to change or alter a solemn personal contract with regard to the use of land. Sullivan v. McCallum, 231 So. 2d 801, 1970 Miss. LEXIS 1612 (Miss. 1970).

Bill for injunction to restrain retailers from selling products of complainant below prices fixed by complainant, as manufacturer of such products, in its trade contracts entered into with certain local retail dealers in conformity with provisions of § 1108, Code of 1942, known as "Fair Trade Act," which contains all essential averments to entitle complainant to benefit of provisions of that act and to enforcement of its trade contracts, and also discloses that action at law for damages would not afford as plain, adequate or complete a relief as would be afforded by injunctive relief, states good cause of action for injunctive relief. W. A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838, 1950 Miss. LEXIS 357 (Miss. 1950).

Fact that acts against which injunction is sought are punishable criminally does not constitute adequate remedy so as to bar equitable relief, although equitable action is never predicated on prevention of crime. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Bill to enjoin appeal from tax assessment not maintainable if remedy is defensive merely and equally available at law. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Validity of appeal from tax assessment may be determined in proceeding at law and is not ground for injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Mere fact that defense to appeal from tax assessment will entail expense not ground for injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Creditor's bill attacking conveyance as fraudulent and for amount due cannot be enjoined by subsequent action where rights of defendant in original action can be fully protected by cross-bill. Grenada Bank v. Waring, 135 Miss. 226, 99 So. 681, 1924 Miss. LEXIS 26 (Miss. 1924).

Defendant sued at law and having only legal defense must make his defense at law. International Harvester Co. v. V. P. Still & Son, 98 Miss. 127, 53 So. 394, 1910 Miss. LEXIS 41 (Miss. 1910).

Judgment creditor cannot be enjoined from garnishing wages of debtor, though the same are exempt and debtor's employer has rule that employees will be discharged if their wages are garnished. Sturges v. Jackson, 88 Miss. 508, 40 So. 547, 1906 Miss. LEXIS 118 (Miss. 1906).

Debtor whose wages are exempt, having adequate remedy at law on indemnity bond given sheriff or sheriff's official bond, cannot enjoin garnishment proceedings. Sturges v. Jackson, 88 Miss. 508, 40 So. 547, 1906 Miss. LEXIS 118 (Miss. 1906).

Suit to enjoin will not lie where ground is available in defense of the action. Larson v. Larson, 82 Miss. 116, 33 So. 717, 1903 Miss. LEXIS 104 (Miss. 1903); International Harvester Co. v. V. P. Still & Son, 98 Miss. 127, 53 So. 394, 1910 Miss. LEXIS 41 (Miss. 1910).

An injunction will not be granted against a judgment at law where relief can be had by petition to the circuit court for a supersedeas of the execution. Ricks v. Richardson, 70 Miss. 424, 11 So. 935, 1892 Miss. LEXIS 81 (Miss. 1892).

3. —Irreparable injury.

The chancery court had full authority to grant injunctive relief wholly absent any showing of irreparable harm where a developer had ignored a county subdivision ordinance. Implicit in land use regulations enacted for the benefit of the public is that substantial violations, per se, cause irreparable harm. Johnson v. Hinds County, 524 So. 2d 947, 1988 Miss. LEXIS 194 (Miss. 1988).

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits, and where damages would be irreparable. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Injunction not granted on ex parte application without notice except in cases of greatest emergency and to prevent irreparable injury. Glover v. Falls, 120 Miss. 201, 82 So. 4, 1919 Miss. LEXIS 78 (Miss. 1919).

Taxpayers objecting to submission of legislative act to referendum on the ground of invalidity of referendum law do not suffer irreparable injury entitling them to an injunction. Power v. Ratliff, 112 Miss. 88, 72 So. 864, 1916 Miss. LEXIS 70 (Miss. 1916).

4. —Multiplicity of suits.

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits, and where damages would be irreparable. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Equity may interfere to prevent multiplicity of suits where injury is continuing in effect. Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559, 1910 Miss. LEXIS 1 (Miss. 1910).

Bill to prevent multiplicity of suits does not lie unless same legal questions and practically the same facts are involved, and complainant has good legal or equitable defense to them. Gulf Compress Co. v. Wooten Cotton Co., 98 Miss. 651, 54 So. 86, 1910 Miss. LEXIS 106 (Miss. 1910).

Where defendant in ejectment has equitable defense he may enjoin its prosecution, and his legal defenses may be set up in equity, thus preventing a multiplicity of suits. Butler v. Scottish-American Mortg. Co., 93 Miss. 215, 46 So. 829, 1908 Miss. LEXIS 110 (Miss. 1908).

A number of plaintiffs separately suing the same defendant in actions of trespass, the defendant's liability depending upon the same facts, and the act complained of being a constantly recurring one, may be enjoined and their cases consolidated to prevent a multiplicity of suits. Illinois C. R. Co. v. Garrison, 81 Miss. 257, 32 So. 996, 1902 Miss. LEXIS 136 (Miss. 1902).

Separate actions to recover damages against the complainant where the plaintiffs have no common interest except in the questions of law and facts involved, and where they could not be proceeded against by complainant separately, will not be enjoined. Tribbette v. Illinois C. R. Co., 70 Miss. 182, 12 So. 32, 1892 Miss. LEXIS 87 (Miss. 1892).

5. —Laches.

In an action to enjoin the use of a house as a beauty parlor, allegedly in violation of a protective covenant, where the defendant had gained financial benefit from such use of her house for six years prior to the commencement of the suit, she was not entitled to invoke the doctrine of laches since a fundamental rule of the doctrine of laches is that the person who seeks to invoke it must first establish that the delay has resulted to his injury and that it would be inequitable to sustain the suit. Sullivan v. McCallum, 231 So. 2d 801, 1970 Miss. LEXIS 1612 (Miss. 1970).

An injunction against use of premises as a tea room and gift shop, contrary to a restriction against commercial use in the proprietor's and her previous lessor's deed, was properly denied where the proprietor had, without objection from any owners of other lots in the addition, conducted such business on the premises as a lessee for six years before purchasing the property. Twin States Realty Co. v. Kilpatrick, 199 Miss. 545, 26 So. 2d 356, 1946 Miss. LEXIS 222 (Miss. 1946).

Complainant barred by laches from restraining defendant using its name, emblem, and insignia. Supreme Lodge K. P. v. Knights of Pythias, 102 Miss. 280, 59 So. 88, 1912 Miss. LEXIS 54 (Miss. 1912).

6. Mandatory injunction.

A mandatory injunction must be specific and spell out exactly what the parties are to do or refrain from doing. Johnson v. Hinds County, 524 So. 2d 947, 1988 Miss. LEXIS 194 (Miss. 1988).

Where the complainants, whose home was on the lot adjoining the defendants' lot, charged that the defendants violated front set-back line restrictions by approximately 20 feet in the construction of a home, but had failed to object to the violation during construction until the foundation slab had been poured and the house had been roughed in, and failed to show such great damage or irreparable injury as to require the issuance of a mandatory injunction, the court's failure to grant a request for a mandatory injunction, requiring instead that complainants accept damages in lieu of injunction, was not an abuse of discretion, the mandatory injunction being an extraordinary remedial process which will not be issued in doubtful cases. Pattillo v. Bridges, 247 So.

2d 811, 1971 Miss. LEXIS 1454 (Miss. 1971).

Mandatory injunction compelling plaintiff's reinstatement in credit union and retention of his deposit was granted where bylaw amendment permitting expulsion when depositor ceases to be an employee was invalid, because no quorum was present and articles permitted expulsion only for cause, notwithstanding withdrawal from defendant's employment. Hall v. Ingalls Employees Credit Union, 206 Miss. 104, 39 So. 2d 774, 1949 Miss. LEXIS 246 (Miss. 1949).

Mandatory injunction should not be granted without notice unless of unquestionable propriety. Pearman v. Wiggins, 103 Miss. 4, 60 So. 1, 1912 Miss. LEXIS 133 (Miss. 1912); Montgomery v. Hollingsworth, 127 Miss. 346, 90 So. 79, 1921 Miss. LEXIS 235 (Miss. 1921).

Mandatory injunction will lie to require creditor who owned a judgment and a trust deed covering exempt and nonexempt property of his debtor to first exhaust the nonexempt property before resorting to exempt property. Hays v. Barlow, 98 Miss. 487, 54 So. 2, 1910 Miss. LEXIS 88 (Miss. 1910).

A mandatory injunction should not be granted unless there be no reasonable doubt of its propriety, and it is safer to first hear both sides. Gulf Coast Ice Mfg. Co. v. Bowers, 80 Miss. 570, 32 So. 113, 1902 Miss. LEXIS 297 (Miss. 1902).

7. Temporary injunction.

The circumstances in which a preliminary injunction may be granted are not prescribed by the Rules of Civil Procedure, but remain a matter of the trial court's discretion, exercised in conformity with traditional equity practice. Under the traditional practice, the plaintiff bears the burden of showing the prerequisites for obtaining the extraordinary relief of preliminary injunction. Moore v. Sanders, 558 So. 2d 1383, 1990 Miss. LEXIS 154 (Miss. 1990).

Where there exists a serious emergency situation which threatens irreparable injury, the issuance of a preliminary prohibitive injunction without a hearing and without notice to the party against whom relief is sought may be proper. Lance v. Mississippi Employment Sec. Com., 279 So. 2d 622, 1973 Miss. LEXIS 1482 (Miss. 1973).

Temporary injunction may be granted ex parte without notice in cases of greatest emergency. Alexander v. Woods, 103 Miss. 869, 60 So. 1017, 1912 Miss. LEXIS 243 (Miss. 1912).

Temporary injunction should be granted only to prevent irreparable injury. Mayor & Board of Aldermen of Water Valley v. State, 103 Miss. 645, 60 So. 576, 1912 Miss. LEXIS 192 (Miss. 1912).

8. Restraining order.

Restraining order unknown to the practice in this state and cannot be granted upon issuance of citation to show cause why injunction should not be granted, as such citation implies that defendant may not be restrained until after hearing. Castleman v. State, 94 Miss. 609, 47 So. 647, 1909 Miss. LEXIS 317 (Miss. 1909).

9. Persons entitled to relief.

Where the complaint showed that one other than the complainant was in possession of the office and performing the duties thereof, the complainant failed to bring himself within the exception to the general rule that an injunction will not lie to try the right and title to a public office. Lacey v. Noblin, 238 Miss. 329, 118 So. 2d 336, 1960 Miss. LEXIS 409 (Miss. 1960).

Taxpayers not entitled to injunction against construction of overhead passway where entire costs borne by railroad and federal and state highway department. Hinds County v. Johnson, 133 Miss. 591, 98 So. 95, 1923 Miss. LEXIS 169 (Miss. 1923).

Game warden appointed under Laws 1916 ch. 99, could not enjoin submission of the act to a referendum of the voters on the theory that he was entitled to emoluments of his office and might suffer irreparable injury. Power v. Ratliff, 112 Miss. 88, 72 So. 864, 1916 Miss. LEXIS 70 (Miss. 1916).

Owner, without objecting to petition and appealing, may on bill to enjoin issuance of bonds of established drainage districts question court's jurisdiction where such question was one of law to be determined from the record. Hardee v. Brooks, 107 Miss. 821, 66 So. 216, 1914 Miss. LEXIS 148 (Miss. 1914).

State revenue agent cannot enjoin bank from using void order of supervisors assessing back taxes, in circuit court on appeal from order of board rejecting assessment for back taxes by tax collector, as circuit court could give adequate relief. Adams v. First Nat'l Bank, 103 Miss. 744, 60 So. 770, 1912 Miss. LEXIS 225 (Miss. 1912).

Taxpayer may enjoin carrying out of drainage scheme under void statute. Belzoni Drainage Com. v. Winn, 98 Miss. 359, 53 So. 778, 1910 Miss. LEXIS 72 (Miss. 1910).

Either party to suit involving title to land may enjoin the other from cutting timber or committing waste thereon. Freeman v. Ammons, 91 Miss. 672, 46 So. 61, 1907 Miss. LEXIS 210 (Miss. 1907).

Justice of the peace and members of board of supervisors cannot enjoin election to determine question of creation of new county on the ground that the act providing for such election was unconstitutional, as they have no right to complain until directly affected by its operation. Conner v. Gray, 88 Miss. 489, 41 So. 186, 1906 Miss. LEXIS 170 (Miss. 1906).

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. Leatherbury v. McInnis, 85 Miss. 160, 37 So. 1018, 1904 Miss. LEXIS 174 (Miss. 1904) but see Threatt v. Rushing, 361 So. 2d 329, 1978 Miss. LEXIS 2357 (Miss. 1978).

A debtor may enjoin a sale under a deed of trust given to secure a usurious debt by paying or tendering the principal of the debt without interest. Southern Home Bldg. & Loan Ass'n v. Tony, 78 Miss. 916, 29 So. 825, 1901 Miss. LEXIS 143 (Miss. 1901); Purvis v. Woodward, 78 Miss. 922, 29 So. 917, 1901 Miss. LEXIS 148 (Miss. 1901); Parchman v. McKinney, 20 Miss. 631, 1849 Miss. LEXIS 106 (Miss. 1849), limited, Dickerson v. Thomas, 67 Miss. 777, 7 So. 503, 1890 Miss. LEXIS 117 (Miss. 1890); Long v. McGregor, 65 Miss. 70, 3 So. 240, 1887 Miss. LEXIS 17 (Miss. 1887); American Freehold Land & Mortg. Co. v. Jefferson, 69 Miss. 770, 12 So. 464, 1892 Miss. LEXIS 20 (Miss. 1892).

10. Subjects of injunctive relief.

11. —Property rights.

Injunction to prevent maintenance of embankment on defendant's land, alleged to cause more water to flow into creek, is properly denied where embankment was constructed for purpose of causing water to flow into creek as natural water course instead of overflowing defendant's field. Jones v. Walker, 44 So. 2d 466 (Miss. 1950).

Complainants are not entitled to injunctive relief against use of property in violation of alleged restrictive covenants when no restrictive covenants are contained in deed to owners of property in question nor in mesne conveyances by which property passed to them. Watson v. Waldon, 43 So. 2d 751 (Miss. 1950).

Equity will not enjoin solvent mortgagee from foreclosing his mortgage through advertisement and sale by a trustee until an accounting can be had between parties to ascertain whether or not mortgagor has counterclaim against the mortgagee, where such counterclaim has arisen out of a separate and distinct transaction from that out of which the mortgage indebtedness arose. Hub Bldg. & Loan Ass'n v. Warren, 207 Miss. 297, 42 So. 2d 203, 1949 Miss. LEXIS 340 (Miss. 1949).

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits and where damages would be irreparable. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

State court of equity has jurisdiction to protect certified common carrier of passengers by motor vehicle in interstate and intrastate commerce in its property rights in its large investments in state and to prevent, by injunction, through force, intimidation and violence, irreparable injury to persons and property. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Injunction will not lie to restrain prosecution of replevin to recover property by claimant not holder of warehouse receipts issued therefor. Sunflower Compress Co. v. Staple Cotton Co-op. Ass'n, 139 Miss. 200, 103 So. 802, 1925 Miss. LEXIS 121 (Miss. 1925).

Error to dismiss bill and deny relief for trespass on land in seeking private way, where it alleged that no proceeding had before board of supervisors. Whitefort v. Homochitto Lumber Co., 130 Miss. 14, 93 So. 437, 1922 Miss. LEXIS 181 (Miss. 1922).

Injunction against interference of property rights may be granted although defendant may be guilty of criminal trespass where such fact is mere incident to and not made basis of equitable relief. Floyd v. Adler, 96 Miss. 544, 51 So. 897, 1910 Miss. LEXIS 201 (Miss. 1910).

Either party to suit involving title to land may enjoin the other from cutting timber or committing waste thereon. Freeman v. Ammons, 91 Miss. 672, 46 So. 61, 1907 Miss. LEXIS 210 (Miss. 1907).

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. Leatherbury v. McInnis, 85 Miss. 160, 37 So. 1018, 1904 Miss. LEXIS 174 (Miss. 1904) but see Threatt v. Rushing, 361 So. 2d 329, 1978 Miss. LEXIS 2357 (Miss. 1978).

An injunction will not lie at the suit of one asserting ownership of land to restrain the cutting of timber by a solvent person in possession claiming title in good faith, there being no pending suit to which the injunctive relief is ancillary. J. E. North Lumber Co. v. Gary, 83 Miss. 640, 36 So. 2, 1903 Miss. LEXIS 84 (Miss. 1903).

12. —Elections.

Referendum election cannot be enjoined. Power v. Ratliff, 112 Miss. 88, 72 So. 864, 1916 Miss. LEXIS 70 (Miss. 1916).

Chancery court has jurisdiction to enjoin election in violation of Constitution and laws of the state. Conner v. Gray, 88 Miss. 489, 41 So. 186, 1906 Miss. LEXIS 170 (Miss. 1906).

Act providing for election to determine question of creating new county being constitutional, neither the election nor returns thereof can be enjoined. Conner v. Gray, 88 Miss. 489, 41 So. 186, 1906 Miss. LEXIS 170 (Miss. 1906).

13. —Nuisances.

In an action to abate a gambling place nuisance, a temporary injunction is not void because it does not describe the premises. Alexander v. State, 210 Miss. 517, 49 So. 2d 387, 1950 Miss. LEXIS 353 (Miss. 1950).

In a suit to abate a gambling place as a nuisance, the chancery court had power to issue temporary injunction inasmuch as § 1073, Code of 1942, specifically provides that all rules of evidence and of practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure thereunder and this evidences a legislative intent to grant the court the full use of its injunctive powers. Alexander v. State, 210 Miss. 517, 49 So. 2d 387, 1950 Miss. LEXIS 353 (Miss. 1950).

Municipality creates public nuisance, which equity court has power to enjoin, when it gathers surface waters from thirteen-acre area, much of it diverted from its natural flow, concentrates it into thirty-inch culvert and discharges it upon lot adjoining important thoroughfare, with outtake therefrom of only fifteen inches, resulting in unsightly and unsanitary mosquito-breeding pond constituting menace to public health. City of Jackson v. Robertson, 208 Miss. 422, 44 So. 2d 523, 1950 Miss. LEXIS 258 (Miss. 1950).

It is not essential to grant of relief against municipality that negligence be shown where created condition against which relief is sought constitutes public nuisance. City of Jackson v. Robertson, 208 Miss. 422, 44 So. 2d 523, 1950 Miss. LEXIS 258 (Miss. 1950).

Gasoline filling station not nuisance per se but may be so operated as to become nuisance and subject to injunction. National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388, 1924 Miss. LEXIS 76 (Miss. 1924).

Street railroad may be enjoined from maintaining tracks so near abutting property as to become nuisance. Meridian L. & R. Co. v. Slaughter, 98 Miss. 420, 53 So. 952, 1910 Miss. LEXIS 79 (Miss. 1910).

14. —Taxes.

Chancery court may not enjoin prosecution by state, county, or municipality of appeal from tax assessment. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Alleged intention of attorney-general in appeal from tax assessment, to secure 100% as against 60% assessment for other property not ground for injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

A proceeding to assess property will not be enjoined. Yazoo & M. V. R. Co. v. Adams, 73 Miss. 648, 19 So. 91, 1895 Miss. LEXIS 123 (Miss. 1895).

An injunction does not lie against an alleged excessive assessment. Board of Sup'rs v. Ames, 3 So. 37 (Miss. 1887).

15. —Criminal prosecutions.

Criminal prosecutions which may result in fines and costs cannot be enjoined. Board of Sup'rs v. Owen, 100 Miss. 462, 56 So. 525, 1911 Miss. LEXIS 50 (Miss. 1911).

Equity will not enjoin arrest and fining of merchant for alleged disturbance of peace by using a megaphone to call attention to clearance sale. Pleasants v. Smith, 90 Miss. 440, 43 So. 475, 1907 Miss. LEXIS 72 (Miss. 1907).

16. —Miscellaneous.

Evidence that production of salt water was increasing significantly so that oil-gas and mineral lessee faced imminent additional increase and that a very small pit was available to contain salt water, that prudence on the part of the lessee necessitated immediate steps to take care of salt water, that the owner of surface rights to the land involved as well as other landowners were threatened with damages from overflows, that under the lease the lessee had the right to place pipes across the land of the surface rights owner, and that the surface rights owner determined that the lessee should not be allowed to place the pipeline across his lands without first making an advance settlement with him, justified both the temporary injunction without notice as well as the permanent injunction enjoining the surface rights owner from interfering with the laying of a pipeline across his lands. Lance v. Mississippi Employment Sec. Com., 279 So. 2d 622, 1973 Miss. LEXIS 1482 (Miss. 1973).

As an exception to the general rule, an injunction will be granted at the instance of an incumbent of office to restrain a claimant from interfering with him, but the incumbent must show that he has possession of the office, and the prima facie right to occupy it, or there is no other person authorized by law to hold it, but where the complaint reflected that one other than the complainant was in possession of the office and performing their duties thereof, the claimant failed to come within the exception. Lacey v. Noblin, 238 Miss. 329, 118 So. 2d 336, 1960 Miss. LEXIS 409 (Miss. 1960).

Chancery court may and, in proper case, will restrain its own citizens, or other persons within the control of its process, from prosecuting actions or proceedings in other states. Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

Ordinarily chancery will enjoin an action in another state where it appears that it is fraudulent or brought for purpose of vexing, harassing or oppressing an opponent, or that it is an evasion of laws of the domicil. Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

Rule to effect that citizen of one state may be enjoined from prosecuting action against another citizen of same state applies equally when injunction is sought to restrain citizen of one state from prosecuting action against nonresident corporation doing business with lawful authority in such state. Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

State courts cannot interfere with federal courts as general rule, but when defendant is resident citizen of this state he can be required by injunction to bring his proposed action of libel within this state, it not having been previously filed, since it is strictly proceeding in personam, where Congress has not fixed venue. Poole v. Mississippi Publishers Corp., 208 Miss.

364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

Chancery court properly enjoined defendant as resident citizen of this state from suing Delaware corporation, authorized to do business in this state and with its principal place of business in this state, in any Delaware court, state or federal, for tort action in libel, there being no federal statute prescribing venue for such action, where it appeared from bill that defendant was seeking more to obtain compromise than to prosecute good faith suit, and suit in state of Delaware would impose inequitable hardship and irreparable injury upon corporation. Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 So. 2d 467, 1950 Miss. LEXIS 255 (Miss. 1950).

Injunction against municipal water and electric light commissioners enjoining them from putting into effect disability and pension system for their employees as authorized by special legislative enactment is not proper when burden of showing unconstitutionality of enactment has not been met and it has not been shown that it was outside competence of legislature to authorize commissioners to establish proper system applicable to employees affected by the legislation. Palmertree v. Garrard, 207 Miss. 796, 43 So. 2d 381, 1949 Miss. LEXIS 389 (Miss. 1949).

Mortgagee will not be enjoined from foreclosing until accounting can be had to ascertain whether mortgagors had setoff against mortgagee where claim was unliquidated and there was no allegation of insolvency of mortgagee. Hub Bldg. & Loan Ass'n v. Warren, 207 Miss. 297, 42 So. 2d 203, 1949 Miss. LEXIS 340 (Miss. 1949).

State chancery court has jurisdiction to issue injunction on behalf of bus company engaged in interstate and intrastate commerce against labor union and its members to enjoin use of violence, force, intimidation, and coercion during labor dispute. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Jurisdiction of court of equity may be invoked by one being picketed for injunctive relief against mass picketing. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Bill alleging that unions and their members are maintaining picket lines around terminals, garages, office buildings and other property of complainant, are coercing, intimidating and threatening present and prospective employees, and are conspiring together to unlawfully, and by means of violence, prevent general public from using complainant's services alleges facts sufficient to invoke jurisdiction of court of equity and to obtain injunctive relief. Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, etc., 205 Miss. 354, 38 So. 2d 765, 1949 Miss. LEXIS 435 (Miss. 1949).

Chancellor properly denied injunction restraining husband from leaving jurisdiction of court for purpose of obtaining a divorce, under the particular circumstances, in wife's suit for separate support and maintenance. Ballard v. Ballard, 199 Miss. 316, 24 So. 2d 335, 1946 Miss. LEXIS 200 (Miss. 1946).

A person may enjoin the unauthorized use of his name in the business of another, but the court will not enjoin the use of a name in a locality when no competition exists. Cockrell v. Davis, 198 Miss. 660, 23 So. 2d 256, 1945 Miss. LEXIS 238 (Miss. 1945).

Evidence sustained finding that defendant, "James Davis Cockrell," in using the name "Jimmie Davis" in connection with his band did so for the purpose of capitalizing on the reputation and name of complainant, "James Harold Davis," who had been using the name "Jimmie Davis" which had acquired the attributes of a tradename and had become identified with complainant nationally, and that confusion resulted therefrom and that competition did exist, so that injunctive relief was proper. Cockrell v. Davis, 198 Miss. 660, 23 So. 2d 256, 1945 Miss. LEXIS 238 (Miss. 1945).

Citizen of state may be enjoined from prosecuting action against another citizen of same state in foreign jurisdiction to evade law of his own state. Davis v. Natchez Hotel Co., 158 Miss. 43, 128 So. 871, 1930 Miss. LEXIS 11 (Miss. 1930).

Equity can restrain replevin of piano bought on installment plan and decree redemption of the lien sought to be enforced by defendant. McIntyre v. E.E. Forbes Piano Co., 100 Miss. 517, 56 So. 457, 1911 Miss. LEXIS 45 (Miss. 1911).

Trustees and teacher of school district may be enjoined from enforcing an invalid rule. Hobbs v. Germany, 94 Miss. 469, 49 So. 515, 1909 Miss. LEXIS 374 (Miss. 1909).

Ejectment based on invalidity of appointment of substituted trustee in deed of trust who sold land to complainant, will be enjoined where complainant has been in possession 8 years, the original debt has become barred, and complainant offers to do equity. Wall v. Harris, 90 Miss. 671, 44 So. 36, 1907 Miss. LEXIS 105 (Miss. 1907).

A bill by debtors to determine to whom their debt should be paid is a bill of interpleader, although relief by injunction be asked, and the rights of the parties should be treated accordingly. Quin v. Hart, 85 Miss. 71, 37 So. 553, 1904 Miss. LEXIS 115 (Miss. 1904).

A complainant in a bill of interpleader is not entitled to relief by injunction when he has paid nothing into court. Quin v. Hart, 85 Miss. 71, 37 So. 553, 1904 Miss. LEXIS 115 (Miss. 1904).

17. Pleading.

Determination of plaintiff's right to injunction upon final hearing would not be determined upon demurrer but would be left until the hearing, in suit by district attorney on behalf of county or district thereof against member of board of supervisors of the district and his surety to recover loss resulting from unauthorized use of construction equipment for benefit of private individuals. Shumpert v. Lee County, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

Oath or other means, by which chancellor must be satisfied of complainant's equity and truth of allegations of bill before granting preliminary injunction, need not appear of record. Hanna v. State, 169 Miss. 314, 153 So. 371, 1934 Miss. LEXIS 57 (Miss. 1934).

Complainant's bill seeking greater relief than is allowable is not bad on that account, as he is still entitled to all relief to which he shows a right. State ex rel. Attorney Gen. v. Marshall, 100 Miss. 626, 56 So. 792, 1911 Miss. LEXIS 64 (Miss. 1911).

It is not necessary in all cases that the bill be sworn to. It is sufficient if the chancellor be satisfied of complainant's equity "by oath or other means." Purvis v. Woodward, 78 Miss. 922, 29 So. 917, 1901 Miss. LEXIS 148 (Miss. 1901).

18. Judgment or decree.

Clerk required to obey judgment though injunction erroneous. Bruister v. Tansil, 99 So. 258 (Miss. 1924).

Fiat directing issuance of injunction held to limit clerk's authority in doing so, and not to be against discrimination in water rates where requirement was that waterworks company refrain from cutting off water supply. Griffith v. Vicksburg Waterworks Co., 88 Miss. 371, 40 So. 1011, 1906 Miss. LEXIS 156 (Miss. 1906).

RESEARCH REFERENCES

ALR.

Power to enjoin canvassing votes and declaring result of election. 1 A.L.R.2d 588.

Injunction by state court against action in court of another state. 6 A.L.R.2d 896.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates. 8 A.L.R.2d 839.

Legality of, and injunction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment. 11 A.L.R.2d 1338.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Mandatory injunction prior to hearing of case. 15 A.L.R.2d 213.

Who, under Federal Rule 65(d) and state counterparts, are persons "in active concert or participation" with parties to action so as to be bound by order granting an injunction. 97 A.L.R.2d 490.

Recovery of damages resulting from

wrongful issuance of injunction as limited to amount of bond. 30 A.L.R.4th 273.

Propriety of injunction by federal court in civil action restraining prosecution of later civil action in another federal court where one or more parties or issues are, or allegedly are, same. 42 A.L.R. Fed. 592.

Who, under Rule 65(d) of Federal Rules of Civil Procedure, are persons "in active concert or participation" with parties to action so as to be bound by order granting injunction. 61 A.L.R. Fed. 482.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Form 4.1 (Complaint, petition, or declaration – For declaratory and injunctive relief – To compel sheriff to furnish television station with information on concealed weapons licenses).

21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Form 4.3 (Order – Preliminary injunction – Requiring disclosure of information on concealed weapons licenses).

CJS.

43A C.J.S., Injunctions § 147.

§ 11-13-3. Security required to stay proceedings at law.

An injunction to stay proceedings at law shall not be issued until after the party obtaining the injunction shall give security in such sum as the court deems proper for the payment of costs, damages and reasonable attorney's fees as may be incurred or suffered by any party who is found to be wrongfully enjoined.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 2 (43); 1857, ch. 62, art. 65; 1871, § 1044; 1880, § 1905; 1892, § 558; 1906, § 609; Hemingway's 1917, § 369; 1930, § 416; 1942, § 1336; Laws, 1991, ch. 573, § 24, eff from and after July 1, 1991.

Cross References — Bond for stay of execution, see § 11-51-59.
The restoration of money on enjoining of execution, see § 13-3-183.
Injunctions, see Miss. R. Civ. P. 65.
Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Dissolution of injunction.

1. In general.

This section [Code 1942, § 1336] does not apply to a suit to restrain a building contractor from foreclosing a deed of trust executed by the owner until he should have fully performed his contract. Aqs Lumber Co. v. Heathman, 246 Miss. 314, 149 So. 2d 335, 1963 Miss. LEXIS 445 (Miss. 1963).

Where injunction bond as originally written was sufficient, permitting amendment showing signers were sureties and making condition accord with statutory requirement held not prejudicial. Davis v. Natchez Hotel Co., 158 Miss. 43, 128 So. 871, 1930 Miss. LEXIS 11 (Miss. 1930).

Chancery clerk taking injunction bond in proper amount is not subject to statutory penalty or damages if sureties are solvent. Davis v. Hale, 155 Miss. 309, 124 So. 370, 1929 Miss. LEXIS 297 (Miss. 1929).

Equity has jurisdiction to restrain proceedings at law only where some equitable ground exists, and remedy at law is not plain, adequate, and complete. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

2. Dissolution of injunction.

Injunction to stay proceedings at law must be dissolved where plaintiff fails to give bond in double the amount of the debt sued for. Tillman v. Heard, 95 Miss. 238, 48 So. 963, 1909 Miss. LEXIS 250 (Miss. 1909).

Injunction of foreclosure of trust deed after advertisement for sale, later dissolved, entitled defendant to counsel fees for procuring dissolution and for printer's fees for the advertisement. Gulfport Land Improv. Co. v. Augur, 95 Miss. 292, 48 So. 722 (Miss. 1909).

On the partial dissolution of an injunction by a county to restrain an action of ejectment for lands held by it, attorney's fees and interest on rents may be allowed. Allen v. Leflore County, 80 Miss. 298, 31 So. 815 (Miss. 1902).

RESEARCH REFERENCES

ALR.

Partial dissolution of injunction as breach of injunction bond. 40 A.L.R. 990.

Bond as prerequisite to temporary restraining order. 73 A.L.R.2d 854.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 172- 190, 206, 209.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

10 Am. Jur. Legal Forms 2d, Injunctions §§ 147:14 et seq. (injunction bond).

CJS.

43A C.J.S., Injunctions §§ 163–202.

§ 11-13-5. Bond when injunction is not to stay proceedings at law.

Where the injunction shall not be for the stay of proceedings in an action at law for the recovery of money, or upon a judgment requiring the payment of money, the party applying for the injunction shall, before the issuance of the same, enter into bond in like manner as provided for in Section 11-13-3, in a sufficient penalty, to be fixed by the judge granting the same, conditioned for the payment of all damages and costs which may be awarded against him, or which the opposite party may suffer or sustain by reason of the suing out of said injunction, in case the same shall be dissolved.

HISTORY: Codes, 1857, ch. 62, art. 66; 1871, § 1045; 1880, § 1906; 1892, § 559; 1906, § 610; Hemingway's 1917, § 370; 1930, § 417; 1942, § 1337.

Cross References — Injunction against unfair competition with electric power association, see § 77-5-509.

Injunction to enforce contract with cooperative marketing association, see § 79-19-33.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Liability on bond.
3. Damages in general.
4. —Attorney fees.
5. Measure of damages.

1. In general.

The chancery court erred in denying a motion to dissolve a preliminary injunction where the injunction had been issued without the required bond having first been posted. Invesat Corp. v. Harrison Enterprises, Inc., 386 So. 2d 721, 1980 Miss. LEXIS 2053 (Miss. 1980).

The bond provided for by this section [Code 1942 § 1337] is mandatory, and its amount is within the sound discretion of the chancellor whose decision will not be disturbed on appeal unless this discretion has been abused. International Asso. of Bridge, Structural & Ornamental Ironworkers v. Howard L. Byrd Bldg. Service, Inc., 284 So. 2d 301, 1973 Miss. LEXIS 1254 (Miss. 1973).

This section [Code 1942, § 1337] provides the method for determining the amount of an injunction bond in a suit to restrain a building contractor from foreclosing a deed of trust executed by the owner until he should have fully performed his contract. Aqs Lumber Co. v. Heathman, 246 Miss. 314, 149 So. 2d 335, 1963 Miss. LEXIS 445 (Miss. 1963).

Appellees were not entitled to an injunction to prevent the foreclosure of a deed of trust where they did not give an injunction bond sufficient for the payment of the damages allowed by Code 1942, § 1352, in the event of its dissolution. Federal Land Bank v. Brumfield, 185 Miss. 487, 187 So. 522, 1939 Miss. LEXIS 138 (Miss. 1939).

Chancery court had no authority to issue preliminary mandatory injunction until bond was given and approved as provided by this section [Code 1942, § 1337]. Morris v. Trussell, 144 Miss. 343, 109 So. 854, 1926 Miss. LEXIS 365 (Miss. 1926).

Sequestration bond is distinct from injunction bond. Harleston v. West Louisiana Bank, 126 Miss. 593, 89 So. 257, 1921 Miss. LEXIS 67 (Miss. 1921).

Writ issued without bond given is void. Castleman v. State, 94 Miss. 609, 47 So. 647, 1909 Miss. LEXIS 317 (Miss. 1909).

2. Liability on bond.

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

That defendants were not damaged, but were only restrained from proceeding in unlawful manner, held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Expenses not shown to be necessary and not properly separated from expenses incurred before issuance of injunction could not be allowed in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Damages and attorney's fees on dissolution held not liable where injunction rightfully sued out. United States Fidelity & Guaranty Co. v. Jackson, 123 Miss. 676, 86 So. 456, 1920 Miss. LEXIS 69 (Miss. 1920).

The dismissal of the appeal dissolves the injunction, conclusively determines that it was wrongfully sued out, and makes the bond liable. Yale v. Baum, 70 Miss. 225, 11 So. 879, 1892 Miss. LEXIS 80 (Miss. 1892).

3. Damages in general.

Dismissal of bill establishes that injunction was wrongfully sued out, and that defendant is entitled to damages sustained by issuing of injunction. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Members of political party could sue as individuals for expenses incurred as result of wrongful issuance of injunction restraining holding of primary elections and conventions. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Damages for wrongful issuance of injunction may be allowed on appeal. Brooks-Scanlon Co. v. Stogner, 114 Miss. 736, 75 So. 596, 1917 Miss. LEXIS 92 (Miss. 1917).

4. —Attorney fees.

In suit for perpetual injunction to restrain defendants from utilizing space for any purpose other than right of way as actual means of access to their property, complainant is not entitled to recover damages by way of attorneys' fees when only hearing of cause was full trial upon merits. Feld v. Young Men's Hebrew Ass'n, 208 Miss. 451, 44 So. 2d 538, 1950 Miss. LEXIS 264 (Miss. 1950).

Allowance of attorney's fees under provision of note therefor, if it should be put in attorney's hands for collection, held erroneous as damage in injunction suit. Middleton v. Zachary, 136 Miss. 395, 101 So. 558, 1924 Miss. LEXIS 151 (Miss. 1924).

Attorney's fees do not include services in assessing damages after dissolution of the injunction. Thornton-Claney Lumber Co. v. J. M. O'Quin & Sons, 115 Miss. 857, 76 So. 732, 1917 Miss. LEXIS 271 (Miss. 1917).

Injunction bond in an unsuccessful suit against city covers amount necessary to pay special counsel to assist city attorney. Vicksburg Waterworks Co. v. Vicksburg, 99 Miss. 132, 54 So. 852, 1910 Miss. LEXIS 26 (Miss. 1910).

Solicitors' fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. Hinton v. Board of Sup'rs, 84 Miss. 536, 36 So. 565 (Miss. 1904).

Where a suit is alone for an injunction which is dissolved and the complainant is cast in the suit, attorney's fees incurred in defending the whole case should be allowed. Jamison v. Houston, 74 Miss. 890, 21 So. 972 (Miss. 1897).

Board of supervisors held liable on injunction bond for actual damages, including attorney's fees. Freeman v. Supervisors, 66 Miss. 1, 5 So. 516, 1888 Miss. LEXIS 47 (Miss. 1888).

The bond covers attorney's fees and costs of the transcript of papers used on the trial. Baggett v. Beard, 43 Miss. 120, 1870 Miss. LEXIS 11 (Miss. 1870).

5. Measure of damages.

Damages, besides attorney's fees, for injunction preventing sale of lumber is difference in price of lumber when injunction sued out and its value when dissolved, with interest on difference for the period. Thornton-Claney Lumber Co. v. J. M. O'Quin & Sons, 115 Miss. 857, 76 So. 732, 1917 Miss. LEXIS 271 (Miss. 1917).

RESEARCH REFERENCES

ALR.

Limitation of antitrust damages under 15 USCS § 15 to amount of injunction bond where there has been per se violation of § 1 of Sherman Act (15 USCS § 1). 50 A.L.R. Fed. 575.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 248- 256.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

10 Am. Jur. Legal Forms 2d, Injunctions §§ 147:14 et seq. (injunction bond).

CJS.

43A C.J.S., Injunctions §§ 399–406.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-13-7. Bonds in particular cases.

If the injunction be to stay a sale under execution of certain designated property, real or personal, or any proceeding at law as to certain specified things, and not to restrain proceedings at law generally, bond may be given as provided in Section 11-13-5; but if the injunction shall be obtained on the ground of some objection to the judgment or execution, or the demand of the party enjoined to sustain his claim, and shall not be confined to a contest of his right to subject to his demand particular property by his proceeding, bond shall be given as prescribed in Section 11-13-3.

HISTORY: Codes, 1880, § 1907; 1892, § 560; 1906, § 611; Hemingway's 1917, § 371; 1930, § 418; 1942, § 1338.

Cross References — Restoration of personal property levied on, see § 11-13-19.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

ALR.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 248- 256.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

7 Am. Jur. Proof of Facts 3d 1, Injuries from Drugs.

CJS.

43A C.J.S., Injunctions §§ 399–406.

§ 11-13-9. Bond not required of state, county, municipality.

Neither the state, nor any county, nor any municipality, nor any state officer of the state suing out an injunction in his official character, shall be required to give bond to obtain an injunction.

HISTORY: Codes, 1880, § 1909; 1892, § 562; 1906, § 613; Hemingway's 1917, § 373; 1930, § 419; 1942, § 1339; Laws, 1908, ch. 158.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Injunctions § 252.

CJS.

43A C.J.S., Injunctions §§ 399–406.

§ 11-13-11. Restraint on collection of taxes.

The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law.

HISTORY: Codes, 1880, § 1831; 1892, § 483; 1906, § 533; Hemingway's 1917, § 290; 1930, § 420; 1942, § 1340.

Cross References — Prohibition against injunction to restrain the collection of sales taxes, see § 27-65-71.

Prohibition of injunction to restrain collection of contributions for unemployment compensation, see § 71-5-381.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Right and propriety of action.
3. —Necessity of tender of tax legally due.
4. —Tax assessment.
5. Proceedings in general.

1. In general.

The statute provides state citizens with a plain, speedy, and efficient remedy for challenging a municipal tax, including actions in which a citizen seeks a refund. Home Builders Ass'n v. City of Madison, 143 F.3d 1006, 1998 U.S. App. LEXIS 14884 (5th Cir. Miss. 1998).

Title 27, Chapter 7, and particularly § 11-13-11, provide a sufficiently plain, speedy, and efficient remedy to satisfy the Tax Injunction Act; § 27-73-1 is analogous to a general statute of limitations which gives way to a specific statute, so that this section in no way interferes with or prevents recovery under income tax refund statutes. Todd v. Johnson, 718 F. Supp. 1305, 1989 U.S. Dist. LEXIS 9982 (S.D. Miss. 1989).

Under § 11-13-11, which provides the Chancery Court with jurisdiction over suits by taxpayers to restrain the collection of taxes levied without authority of law, the court has the authority to enjoin the collection or assessment of taxes, and once a complaint has been filed demanding relief of the sort contemplated by § 11-13-11, the Chancery Court has subject matter jurisdiction. The language of § 27-65-71, which purports to bar application of § 11-13-11 to taxes imposed by the sales tax chapter, is only effective if the case fails to meet the legislatively and judicially created requirements necessary to invoke jurisdiction under the latter statute. Marx v. Truck Renting & Leasing Asso., 520 So. 2d 1333, 1987 Miss. LEXIS 2855 (Miss. 1987), overruled in part, Commonwealth Brands v. Morgan, 110 So. 3d 752, 2013 Miss. LEXIS 141 (Miss. 2013).

Under this section, it is unnecessary that the taxpayer must have sought redress before the proper authorities or must have invited other taxpayers to join him, and the only factor to be taken into consideration in deciding whether to grant injunctive relief is whether the taxpayer has no adequate remedy at law. Fondren v. State Tax Com., 350 So. 2d 1329, 1977 Miss. LEXIS 2245 (Miss. 1977).

Code 1942, § 1340 provides taxpayers with a plain, speedy, and efficient remedy, thus precluding federal jurisdiction. Bland v. McHann, 463 F.2d 21, 1972 U.S. App. LEXIS 8695 (5th Cir. Miss. 1972), cert. denied, 410 U.S. 966, 93 S. Ct. 1438, 35 L. Ed. 2d 700, 1973 U.S. LEXIS 3138 (U.S. 1973).

This section [Code 1906, § 533] is only authority of equity to enjoin collection of taxes. Purvis v. Robinson, 110 Miss. 64, 69 So. 673, 1915 Miss. LEXIS 7 (Miss. 1915).

2. Right and propriety of action.

Taxpayers seeking to challenge the authority of the Board of Supervisors in letting appraisal contracts under § 27-35-101 were not entitled to injunctive relief under § 11-13-11 where the taxpayers had a complete and adequate remedy at law through § 27-35-119. Lewis v. Mass Appraisal Services, Inc., 396 So. 2d 35, 1981 Miss. LEXIS 1985 (Miss. 1981).

In a taxpayer's suit to enjoin the State Tax Commission from approving each county's recapitulation of its assessment rolls until such time as the Commission should comply with its duty to equalize assessments among counties as provided by Code 1972 §§ 27-35-113 et seq. and Const. 1890 Art. 4 § 112, the complaint was sufficient to warrant the conclusion that the Commission's legal remedies were provided by Code 1972 § 27-35-163, which allow a taxpayer to obtain a judicial determination that a particular piece of property has been improperly assessed and to obtain a reduction in the tax, or by Code 1972 § 27-35-93 & § 27-35-119, which prescribe methods by which to determine the proper assessment of the particular piece of property, since plaintiff-taxpayer was not alleging an erroneous computation of the value of actions result in the collection of taxes "without authority of law" as a prerequisite for injunctive relief under Code 1972 § 11-13-11, where the complaint alleged the Commission's failure over a period of many years to carry out its duty of equalizing assessments and in essence alleged that owners of parcels of land of identical value in different counties may face radically different tax liabilities; no adequate his property and was not seeking a new calculation of his tax. Fondren v. State Tax Com., 350 So. 2d 1329, 1977 Miss. LEXIS 2245 (Miss. 1977).

This section [Code 1942, § 1340] does not justify proceeding to enjoin collection of additional sale tax assessment where judgment sustaining the validity of such assessment had been affirmed by supreme court. Viator v. Edwins, 195 Miss. 220, 14 So. 2d 212, 1943 Miss. LEXIS 129 (Miss. 1943).

Even though it should be conceded that this section [Code 1942, § 1340] dispenses with a necessity for showing an independent equity in order to entitle a taxpayer to an injunction, it certainly does not do so when the taxes have been levied and are sought to be collected with authority of law. Stone v. Kerr, 194 Miss. 646, 10 So. 2d 845, 1942 Miss. LEXIS 166 (Miss. 1942).

The language of the statute "without authority of law" imports more than mere irregularity or errors of computation, and the correction of improper charges involves matters remediable by appeal or original suit and presupposes jurisdiction. Stone v. Kerr, 194 Miss. 646, 10 So. 2d 845, 1942 Miss. LEXIS 166 (Miss. 1942).

If the proceedings of the state tax commission for the imposition and assessment of tax are void, or if the commission acts in a manner beyond its jurisdiction, or in an unauthorized manner, it acts "without authority of law," but in the event that the hearing is for "a correction of the amount of the tax so assessed" and by a "person improperly charged" with the tax, who is "required to pay the same," it involves at most "an irregularity," and an injunction will not lie. Stone v. Kerr, 194 Miss. 646, 10 So. 2d 845, 1942 Miss. LEXIS 166 (Miss. 1942).

Where bank voluntarily paid taxes and did not avail itself of statutory remedies to cure alleged errors, receiver of bank held not entitled to mandamus to compel attorney general to approve refund. Selig v. Price, 167 Miss. 612, 142 So. 504, 1932 Miss. LEXIS 204 (Miss. 1932).

Consolidated school district tax, levied without separate assessment of property in district, void, and collection enjoined. Morgan v. Wood, 140 Miss. 137, 106 So. 435, 1925 Miss. LEXIS 241 (Miss. 1925).

Court cannot restrain collection of taxes on ground of illegality before the auditor makes assessment thereof. Thompson v. Kreutzer, 103 Miss. 388, 60 So. 334, 1912 Miss. LEXIS 181 (Miss. 1912).

Collection of taxes under law creating school for white children and making no provision for colored children, may be enjoined. McFarland v. Goins, 96 Miss. 67, 50 So. 493, 1909 Miss. LEXIS 18 (Miss. 1909).

Where municipal authorities levy a tax for a proper purpose in excess of the legal limit, the collection of the excess only should be enjoined. Lewis v. Bogue Chitto, 76 Miss. 356, 24 So. 875 (Miss. 1898).

The court will enjoin a tax levied by the board of supervisors in a matter over which it has no jurisdiction. Browning v. Matthews, 73 Miss. 343, 18 So. 658, 1895 Miss. LEXIS 95 (Miss. 1895).

3. —Necessity of tender of tax legally due.

Chancery court did not err in dismissing a taxpayer's complaint against the Mississippi Department of Revenue (MDOR) for lack of subject-matter jurisdiction because the taxpayer failed to pursue the administrative remedies available to him; the MDOR provided sufficient notice to the taxpayer of his tax assessments. Williams v. Morgan, 201 So. 3d 1073, 2016 Miss. App. LEXIS 578 (Miss. Ct. App. 2016).

If by reason of illegal proceedings no valid charge on property is effected, the taxpayer may enjoin without tendering anything. Ball v. Meridian, 67 Miss. 91, 6 So. 645, 1889 Miss. LEXIS 14 (Miss. 1889).

Where part of the tax is legally assessable, and that part is tendered and refused, a bill to enjoin the collection of the excess is maintainable without tendering therewith the part that is legal. City of Meridian v. George, 67 Miss. 86, 6 So. 619 (Miss. 1889).

4. —Tax assessment.

Chancery court erred in finding a taxpayer had an adequate remedy at law because the taxpayer properly alleged an inadequate remedy at law, and no adequate remedy at law was available to review the involuntary withdrawal of its appeal; the taxpayer was precluded from appealing the tax assessment and deprived the Mississippi Board of Tax Appeals from jurisdiction over the appeal. Enscor, LLC v. Morgan, 269 So. 3d 403, 2018 Miss. App. LEXIS 244 (Miss. Ct. App. 2018).

The jurisdiction conferred does not entitle one who complains of an excessive assessment to exhibit his bill for relief. Board of Sup'rs v. Ames, 3 So. 37 (Miss. 1887).

A proceeding to assess property is not "an attempt to collect" them within the meaning of this section [Code 1942, § 1340], and the court will not enjoin the assessment of taxes. Yazoo & M. V. R. Co. v. Adams, 73 Miss. 648, 19 So. 91, 1895 Miss. LEXIS 123 (Miss. 1895); Portwood v. Baskett, 64 Miss. 213, 1 So. 105, 1886 Miss. LEXIS 46 (Miss. 1886).

The remedy of a taxpayer aggrieved by the action of the board of supervisors in increasing the assessment of his property is by an appeal to the circuit court; and failing to pursue this course, he cannot obtain relief in a court of chancery. Anderson v. Ingersoll, 62 Miss. 73, 1884 Miss. LEXIS 21 (Miss. 1884).

5. Proceedings in general.

Taxpayer who had joined with others to obtain injunction restraining collection of privilege taxes for operation of billiard and pool halls held liable for own taxes only on dissolution of injunction and dismissal of bill, regardless of terms of injunction bond. Hamel v. Marlow, 171 Miss. 559, 157 So. 255, 157 So. 905, 1934 Miss. LEXIS 222 (Miss.), set aside, 171 Miss. 565, 157 So. 905 (Miss. 1934).

Unsuccessful contest of validity of privilege tax, though prosecuted in good faith, does not relieve taxpayer of penalty imposed for nonpayment thereof when due. Hamel v. Marlow, 171 Miss. 559, 157 So. 255, 157 So. 905, 1934 Miss. LEXIS 222 (Miss.), set aside, 171 Miss. 565, 157 So. 905 (Miss. 1934).

RESEARCH REFERENCES

ALR.

Financial hardship or inability to pay as rendering inapplicable statutes denying remedy by injunction against tax assessment or collection. 65 A.L.R.2d 550.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 162- 171, 194, 196.

CJS.

43A C.J.S., Injunctions §§ 347-349.

§ 11-13-13. Security required to enjoin collection of taxes.

An injunction shall not be granted to stay the collection of state, county, city, town or village taxes unless upon condition that, before its issuance, the party obtaining it shall give security to the state in such sum as the court deems proper for the payment of damages, costs, and reasonable attorney's fees as may be incurred or suffered by the state, in case the injunction shall be dissolved.

HISTORY: Codes, 1880, § 1908; 1892, § 561; 1906, § 612; Hemingway's 1917, § 372; 1930, § 421; 1942, § 1341; Laws, 1991, ch. 573, § 25, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Interest on delinquent taxes cannot be recovered as damages. Illinois C. R. Co. v. Adams, 78 Miss. 895, 29 So. 996, 1901 Miss. LEXIS 149 (Miss. 1901).

A municipality defending by its attorney, whose annual salary is his only compensation for the service, is not entitled to counsel fees by way of damages on the dissolution of an injunction. Nixon v. Biloxi, 76 Miss. 810, 25 So. 664, 1899 Miss. LEXIS 14 (Miss. 1899).

Execution of the bond is a condition precedent to the remedy by injunction. Yazoo & M. V. R. Co. v. Adams, 73 Miss. 648, 19 So. 91, 1895 Miss. LEXIS 123 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 248- 256.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

CJS.

43A C.J.S., Injunctions §§ 399–406.

§ 11-13-15. Procedure for injunction of the collection of taxes.

All causes in which it is sought to enjoin or delay the collection of any taxes imposed by competent authority shall be preference cases, and tried at the earliest moment compatible with the ends of justice. Upon a dissolution of any such injunction, the chancellor or court ordering it dissolved shall enter a judgment against the person suing out the same and the sureties on his injunction bond, for the amount of the taxes so enjoined and ten percent (10%) thereon, and all costs of suit. Such judgment shall be enforced by execution for the use of the state or county, or both, or of the city, town or village, as the case may require. The said judgment shall be a lien from its date upon the property of the persons against whom it is rendered; and all the property on which the taxes enjoined were assessed shall remain bound by the lien for taxes declared by law, notwithstanding such injunction; and such property may be sold under the execution upon such judgment.

HISTORY: Codes, 1871, § 1751; 1880, § 576; 1892, § 484; 1906, § 534; Hemingway's 1917, § 291; 1930, § 422; 1942, § 1342; Laws, 1991, ch. 573, § 26, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Unsuccessful contest of validity of privilege tax, though prosecuted in good faith, does not relieve taxpayer of penalty imposed for nonpayment thereof when due. Hamel v. Marlow, 171 Miss. 559, 157 So. 255, 157 So. 905, 1934 Miss. LEXIS 222 (Miss.), set aside, 171 Miss. 565, 157 So. 905 (Miss. 1934).

Damages are limited to 10% on dissolution of injunction against collection of taxes. Bullen v. Smith, 146 Miss. 316, 111 So. 454, 1927 Miss. LEXIS 190 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.
42 Am. Jur. 2d, Injunctions §§ 266- 276.
14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 71-101 (Continuance, modification, or dissolution of restraining order or injunction).

§ 11-13-17. Dissolution or modification of injunction of tax collection; general powers.

The provisions of Section 11-13-15 shall apply to a partial dissolution of an injunction of the collection of taxes and to an injunction of the sale of any property for taxes. In all cases of the injunction of the collection of taxes, or of the sale of any property for taxes, the court, or chancellor in vacation, in dissolving in part or in whole, or in modifying an injunction, shall have full power to make such judgment as may be necessary to enforce the right of the state, county, city, town, village, or other competent authority entitled to the taxes involved in such suit, and may direct a sale of any property liable to such taxes, and involved in such suit.

HISTORY: Codes, 1880, § 577; 1892, § 485; 1906, § 535; Hemingway's 1917, § 292; 1930, § 423; 1942, § 1343; Laws, 1991, ch. 573, § 27, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am. Jur.
42 Am. Jur. 2d, Injunctions, §§ 268-274.
14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 71-101 (Continuance, modification, or dissolution of restraining order or injunction).

§ 11-13-19. Chancellor may order return of personal property; execution.

When an injunction shall be granted to stay the sale of personal property, levied on by virtue of an execution, the chancellor may order the property to be restored to the plaintiff, on his giving bond to the sheriff, in such amount and with sufficient sureties as the judge deems proper, payable to the plaintiff in the execution, and conditioned for the redelivery of the property to the sheriff in case the injunction shall be dissolved. Such bond shall be returned by the sheriff with the execution, and shall have the force and effect of a judgment. Liability thereupon may be enforced by the procedure provided for in the Mississippi Rules of Civil Procedure. In case the property shall not be redelivered to the sheriff within fifteen (15) days after the dissolution of the injunction, the clerk of the court to which the bond was returned shall issue execution thereon for the amount of the assessed value of said property and all costs. But in such case, the lien on the property created by the judgment and the execution and levy, shall remain in force; and the sheriff, on a writ of venditioni exponas, or other order of sale, may seize the property so levied on wherever the same may be found.

HISTORY: Codes, 1857, ch. 62, art. 67; 1871, § 1046; 1880, § 1912; 1892, § 565; 1906, § 616; Hemingway's 1917, § 376; 1930, § 424; 1942, § 1344; Laws, 1991, ch. 573, § 28, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be rendered against obligors on injunction bond for amount of judgment or debt enjoined, only defendant's damages should be allowed. Gotelli v. Fountain, 127 Miss. 577, 90 So. 250, 1921 Miss. LEXIS 260 (Miss. 1921).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Injunctions § 60

27A Am. Jur. 2d, Equity § 26.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Form 13.2 (Motion or application – Temporary injunction – Action by administrator of estate – For sale of mobile home).

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Form 41.2 (Order – Granting temporary injunction – Sale of mobile home by decedent's estate).

CJS.

43A C.J.S., Injunctions § 218.

§ 11-13-21. Return of personal property; other causes.

When an injunction shall be granted to stay a sale of personal property seized under a deed of trust or mortgage with power of sale, or in any case in which the sale of such property may be enjoined, the judge may order the property to be restored to the plaintiff on his giving bond to the sheriff in such amount and with sufficient sureties as the judge deems proper, payable to the person by whom such property is to be surrendered and conditioned for the return of the property to the person surrendering it, if the injunction shall be dissolved. Such bond shall be returned by the sheriff with the execution and shall have the force and effect of a judgment. Liability thereupon may be enforced by the procedure provided for in the Mississippi Rules of Civil Procedure. If not discharged by the delivery, within fifteen (15) days after the dissolution of the injunction, of the property to the person in whose possession it was before said order for the restoration to the plaintiff, execution shall be issued on such bond by the clerk for the value of said property.

HISTORY: Codes, 1880, § 1913; 1892, § 566; 1906, § 617; Hemingway's 1917, § 377; 1930, § 425; 1942, § 1345; Laws, 1991, ch. 573, § 29, eff from and after July 1, 1991.

Cross References — Temporary injunctions to abate a nuisance, see §§ 95-3-7, 95-3-9.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am. Jur.

27A Am. Jur. 2d, Equity § 20.

42 Am. Jur. 2d, Injunctions §§ 266- 276.

13 Am. Jur. Legal Forms 2d, Mortgages § 179:456.2.

CJS.

43A C.J.S., Injunctions § 218.

§§ 11-13-23 through 11-13-29. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-13-23. [Codes, 1857, ch. 62, art. 71; 1871, § 1050; 1880, § 1910; 1892, § 563; 1906, § 614; Hemingway's 1917, § 374; 1930, § 426; 1942, § 1346]

§ 11-13-25. [Codes, Hutchinson's 1848, ch. 54, art. 19 (6); 1857, ch. 62, art. 68; 1871, § 1047; 1880, § 1911; 1892, § 564; 1906, § 615; Hemingway's 1917, § 375; 1930, § 427; 1942, § 1347]

§ 11-13-27. [Codes, 1857, ch. 62, art. 70; 1871, § 1049; 1880, § 1914; 1892, § 567; 1906, § 618; Hemingway's 1917, § 378; 1930, § 428; 1942, § 1348]

§ 11-13-29. [Codes, 1880, § 1915; 1892, § 568; 1906, § 619; Hemingway's 1917, § 379; 1930, § 429; 1942, § 1349]

Editor's Notes — Former § 11-13-23 provided for the dissolution of injunctions granted in vacation unless a bill was filled by the first term.

Former § 11-13-25 pertained to release of errors by injunction.

Former § 11-13-27 pertained to motions to dissolve injunctions.

Former § 11-13-29 pertained to the effect of a motion to dissolve an injunction when a motion to strike the answer was pending.

§ 11-13-31. Motion to dissolve injunction; affidavits; evidence.

Either party may, on the hearing of a motion to dissolve an injunction on bill and answer, read in evidence affidavits taken by him, on two days' notice to the opposite party of the time and place of taking such affidavits, and may also introduce oral or documentary evidence, or both, at the hearing.

HISTORY: Codes, 1880, § 1916; 1892, § 569; 1906, § 620; Hemingway's 1917, § 380; 1930, § 430; 1942, § 1350; Laws, 1922, ch. 227.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Where answer under oath was waived in bill and cause was submitted on pleadings, neither party could rely on pleadings as evidence on hearing to dissolve injunction. Davis v. Natchez Hotel Co., 158 Miss. 43, 128 So. 871, 1930 Miss. LEXIS 11 (Miss. 1930).

Question, whether where complainant waives answer under oath, sworn answer can be treated as affidavit on motion to dissolve. Hentz v. Delta Bank, 76 Miss. 429, 24 So. 902, 1898 Miss. LEXIS 114 (Miss. 1898).

RESEARCH REFERENCES

Am. Jur.
42 Am. Jur. 2d, Injunctions §§ 266- 276.

CJS.
43A C.J.S., Injunctions §§ 380-392.

§ 11-13-33. Injunction bond as judgment.

A bond to enjoin proceedings at law on a judgment for money, upon the dissolution of the injunction, in whole or in part, shall have the force and effect of a judgment against the obligors; and liability of such sureties may be enforced under the procedure provided for in the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1880, § 1920; 1892, § 571; 1906, § 622; Hemingway's 1917, § 382; 1930, § 431; 1942, § 1351; Laws, 1991, ch. 573, § 30, eff from and after July 1, 1991.

Cross References — Bond required to stay proceedings at law, see § 11-13-3.
Restoration of money on enjoining of execution, see § 13-3-183.
Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Execution, issuance of.

1. In general.

A decree dissolving a temporary injunction should not include a personal judgment against the plaintiff and the sureties on his bond. Eubanks v. W. H. Hodges & Co., 207 So. 2d 640, 1968 Miss. LEXIS 1626, 1968 Miss. LEXIS 1627 (Miss. 1968).

Where there was a final judgment rendered against sureties on "replevin bond," the amount of judgment being for $500 and costs, but where an injunction was obtained staying proceedings at law on the judgment and also enjoining the sale of property under execution on the judgment, and where the writ of injunction was dissolved by the Supreme Court, the judgment creditor was entitled to the above judgment with legal interest together with five per cent as damages and to all costs in all courts. Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 76 So. 2d 688, 1955 Miss. LEXIS 642 (Miss. 1955).

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be awarded against obligors on injunction bond for amount of judgment or debt enjoined but only for such damages as defendant may have sustained. Gotelli v. Fountain, 127 Miss. 577, 90 So. 250, 1921 Miss. LEXIS 260 (Miss. 1921).

Where injunction restraining execution of a money judgment at law is partly dissolved, personal judgment for true amount of indebtedness should not be granted. Courtney Bros. v. John Deere Plow Co., 122 Miss. 232, 84 So. 185, 1920 Miss. LEXIS 431 (Miss. 1920).

Sureties on bond are released by extension of time for valuable consideration without their consent. Miller v. Lewis, 103 Miss. 598, 60 So. 654, 1912 Miss. LEXIS 204 (Miss. 1912).

2. Execution, issuance of.

Where injunction to restrain execution on money decree was dissolved, execution could issue against sureties on injunction-bond for amount of decree. Russ v. Stockstill, 155 Miss. 368, 124 So. 359, 1929 Miss. LEXIS 290 (Miss. 1929).

Execution could issue within seven years after dissolution of decree enjoining execution on money decree, though original decree was barred. Russ v. Stockstill, 155 Miss. 368, 124 So. 359, 1929 Miss. LEXIS 290 (Miss. 1929).

Execution may be issued under judgment against injunction bond, regardless of alleged error of clerk in ordering execution under prior barred judgment. Stockstill v. Campbell, 145 Miss. 528, 111 So. 93, 1927 Miss. LEXIS 134 (Miss. 1927).

Dissolution of injunction against proceedings at law on judgment for money has the force and effect of a judgment against the obligors on the bond and execution may be issued against them for the amount of the judgment enjoined. Steadman v. Butler, 95 Miss. 695, 49 So. 614, 1909 Miss. LEXIS 282 (Miss. 1909).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 172- 190, 206, 209.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

CJS.

43A C.J.S., Injunctions §§ 163–202.

§ 11-13-35. Damages on dissolution of certain injunctions.

When an injunction, obtained to stay proceedings on a judgment at law for money, shall be dissolved, in whole or in part, damages at the rate of five per centum shall be added to the judgment enjoined, or to so much thereof as shall be found due, including the costs; and the clerk of the chancery court shall certify such dissolution to the clerk of the court in which the judgment was rendered, who shall thereupon issue execution for the damages, as well as for the original debt and costs. Damages at the same rate shall be allowed upon the dissolution of injunctions to stay sales under deeds of trust, or mortgages with power of sale; and such damages may be added to the debt, and collected by the sale of the property, or execution may issue from the chancery court for the same, together with the costs of suit, unless the value of the property, the sale of which was restrained, be less than the amount of the debt, in which case the damages shall be computed on the value of the property, to be ascertained and determined by the chancellor. In all cases upon the dissolution of an injunction, the damages may be ascertained by the court or chancellor, or upon reference to a master, and proof, if necessary, and decree therefor be made, and execution be issued thereon.

HISTORY: Codes, Hutchinson's 1848, ch. 54, arts. 2(41), 19(8); Laws, 1957, ch. 62, art. 72; 1871, § 1051; 1880, § 1918; 1892, § 572; 1906, § 623; Hemingway's 1917, § 383; 1930, § 432; 1942, § 1352.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Dissolution as to proceedings at law.
3. Dissolution as to sale under deed of trust or mortgage.
4. Computation of damages.
5. Execution, issuance of.

1. In general.

Although in exceptional cases actual damages may be allowed in lieu of statutory damages upon dissolution of a temporary injunction, the defendants cannot recover both statutory damages and actual damages; for their recovery is limited either to one or the other. Eubanks v. W. H. Hodges & Co., 207 So. 2d 640, 1968 Miss. LEXIS 1626, 1968 Miss. LEXIS 1627 (Miss. 1968).

Where no injunction is issued this section [Code 1942, § 1352] is inapplicable, and the defendant is not entitled to the allowance of an attorney's fee. Giles v. Desporte Ins. Agency, Inc., 253 Miss. 190, 175 So. 2d 616, 1965 Miss. LEXIS 980 (Miss. 1965).

Mortgagee under deed of trust was not entitled to 5 per cent damages under this section [Code 1942, § 1352] upon dissolution of injunction against foreclosure as to lands properly belonging to mortgagor, where, because not all the land not owned by mortgagor had been deleted from the deed of trust and the proposed foreclosure would include land not owned by the mortgagor, the injunction was retained against such contingency. Barcroft v. Armstrong, 198 Miss. 565, 21 So. 2d 817, 1945 Miss. LEXIS 230 (Miss. 1945).

Appellees were entitled to a writ of injunction to prevent foreclosure of security only upon condition that they give the injunction bond required by law, conditioned for the payment of the damages allowed by this section [Code 1942, § 1352] in the event of dissolution. Federal Land Bank v. Brumfield, 185 Miss. 487, 187 So. 522, 1939 Miss. LEXIS 138 (Miss. 1939).

Dismissal of bill establishes that injunction was wrongfully sued out, and that defendant is entitled to damages sustained by issuing of injunction. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

That defendants were not damaged, but were only restrained from proceeding in unlawful manner, held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Liability of plaintiff upon dissolution of injunction is limited to amount of bond. Staple Cotton Co-op. Ass'n v. Borodofsky, 143 Miss. 585, 108 So. 807, 1926 Miss. LEXIS 294 (Miss. 1926).

Damages should not be awarded if at the time the injunction was obtained the complainant was entitled to the writ. Burroughs v. Jones, 79 Miss. 214, 30 So. 605, 1901 Miss. LEXIS 35 (Miss. 1901).

Where the statutory damages are claimed and allowed, they are exclusive of all other damages; if in exceptional cases actual damages are allowed, the statutory damages cannot be. Williams v. Bank of Commerce, 71 Miss. 858, 16 So. 238, 1894 Miss. LEXIS 34 (Miss. 1894); Nixon v. Seal, 78 Miss. 363, 29 So. 399, 1900 Miss. LEXIS 151 (Miss. 1900).

2. Dissolution as to proceedings at law.

Defendants, on securing dissolution of injunction involving right to approval of appeal bond superseding judgments of justice of peace, were entitled to counsel fees. Renaldo v. Lamas, 151 Miss. 207, 117 So. 528, 1928 Miss. LEXIS 295 (Miss. 1928).

No attorney's fee allowable for defending judgment in injunction suit on appeal. Smith v. Perkins, 125 Miss. 203, 88 So. 531, 1921 Miss. LEXIS 178 (Miss. 1921).

This section [Code 1942, § 1352] provides for recovery of damages, including costs, on partial dissolution of an injunction staying proceedings on money judgment at law. Courtney Bros. v. John Deere Plow Co., 122 Miss. 232, 84 So. 185, 1920 Miss. LEXIS 431 (Miss. 1920).

The section [Code 1942, § 1352] applies exclusively to injunctions sued out by parties to the judgment and only attorney's fees can be allowed where the injunction is sued out by a stranger to the judgment before final decree. Armstrong v. Fusz, 16 So. 532 (Miss. 1894).

3. Dissolution as to sale under deed of trust or mortgage.

The chancellor erred in denying five percent damages upon dissolving an injunction which enjoined the foreclosure of a deed of trust. James v. Jackson Production Credit Asso., 389 So. 2d 494, 1980 Miss. LEXIS 2095 (Miss. 1980).

In awarding damages upon the dissolution of an injunction staying a foreclosure sale under a deed of trust, the total damages allowable under this section was 5 per cent of the debt, and it was error to allow in addition an attorney's fee of $200, for no other damages than statutory damages will be allowed when delay and costs have been the only injury. Giles v. Hengen, 206 So. 2d 626, 1968 Miss. LEXIS 1578 (Miss. 1968).

Where a sale under a trust deed is enjoined, though not threatened and incapable by the terms of the deed of being made for two years, an attorney's fee is not allowable. Wynne v. Mason, 72 Miss. 424, 18 So. 422, 1894 Miss. LEXIS 145 (Miss. 1894).

The statutory damages are allowed whether the injunction be sued out by a party to the instrument or by a stranger. If by the latter they may when awarded be collected by execution. Williams v. Bank of Commerce, 71 Miss. 858, 16 So. 238, 1894 Miss. LEXIS 34 (Miss. 1894); Nixon v. Seal, 78 Miss. 363, 29 So. 399, 1900 Miss. LEXIS 151 (Miss. 1900).

Where an injunction to restrain a sale under a trust deed is dissolved, the statutory damages should be awarded, notwithstanding an appeal to settle the principles of the case is allowed with supersedeas. The five per cent damages are not allowable where the injunction is to prevent a sale by a commissioner in chancery, although under a decree foreclosing a trust deed. Fox v. Miller, 71 Miss. 598, 14 So. 145, 1893 Miss. LEXIS 125 (Miss. 1893).

4. Computation of damages.

Following the dissolution of a preliminary injunction enjoining the foreclosure of a deed of trust, a chancellor properly imposed damages under § 11-13-35 amounting to 5 percent of the entire principal debt secured by the deed of trust, rather than 5 percent of the collateral debt which prompted the foreclosure. Kelso v. McGowan, 604 So. 2d 726, 1992 Miss. LEXIS 301 (Miss. 1992).

In proceedings to enjoin the foreclosure of a deed of trust, the contention that no valid injunction ever issued because of Code 1942, § 1352, providing that when an injunction obtained to stay sales under deeds of trust has been dissolved, damages shall be included in the costs awarded, because the preliminary injunction bond was insufficient, was moot where the court made the injunction permanent and the question of the assessment of damages on the bond would not occur. Carl v. Craft, 258 So. 2d 237, 1972 Miss. LEXIS 1489 (Miss. 1972), overruled in part, Tideway Oil Programs v. Serio, 431 So. 2d 454, 1983 Miss. LEXIS 2581 (Miss. 1983).

On dissolution of an injunction to stay a sale under a deed of trust, the trustee is entitled to damages in the amount of 5% of the amount realized from the sale of the property. Hans v. Wiesenburg, 237 Miss. 351, 114 So. 2d 849, 1959 Miss. LEXIS 477 (Miss. 1959).

Where there was a final judgment rendered against sureties on "replevin bond," the amount of judgment being for $500 and costs, but where an injunction was obtained staying proceedings at law on the judgment and also enjoining the sale of property under execution on the judgment, and where the writ of injunction was dissolved by the Supreme Court, the judgment creditor was entitled to the above judgment with legal interest, together with five per cent as damages, and to all costs in all courts. Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 76 So. 2d 688, 1955 Miss. LEXIS 642 (Miss. 1955).

Damages on dissolution of injunction should be assessed on value of property in case value is less than debt. Coleman v. People's Bank of Lumberton, 146 Miss.

496, 112 So. 686, 1927 Miss. LEXIS 263 (Miss. 1927).

The declaration in a suit on the bond for five per cent damages on the debt secured by the trust deed, a sale under which was enjoined, is demurrable if it fails to allege that the value of the property was not less than such debt. Barber v. Levy, 73 Miss. 484, 18 So. 797, 1895 Miss. LEXIS 100 (Miss. 1895).

5. Execution, issuance of.

Execution may issue under judgment against injunction bond, regardless of alleged error of clerk in ordering execution under prior barred judgment. Stockstill v. Campbell, 145 Miss. 528, 111 So. 93, 1927 Miss. LEXIS 134 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 315-296–316.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 111-119 (Action for wrongful issuance of injunction; recovery on injunction bond).

13 Am. Jur. Legal Forms 2d, Mortgages § 179:456.2.

CJS.

43A C.J.S., Injunctions §§ 441-467.

§ 11-13-37. Post-injuction damages.

Where the party claiming damages shall desire, upon the dissolution of an injunction, to have the same ascertained and decreed by the chancellor or the chancery court, he shall suggest in writing, on the hearing of the motion to dissolve the injunction, the nature and amount of the damages; and the chancellor or court shall hear evidence, if necessary, and assess the damages, and decree the same to the party entitled thereto, for which execution may be issued, as in other cases, against the obligors in the bond given for the injunction. And if the chancellor, instead of hearing evidence as to said damages – which may be by witnesses examined before him in vacation or in term time, or by deposition, according to the circumstances – shall see proper, he may make a reference to a master to take testimony and report in such matter. But nothing herein contained shall prevent the party entitled from maintaining a suit on the injunction bond, if his damages shall not be assessed as herein provided for.

HISTORY: Codes, 1880, § 1919; 1892, § 573; 1906, § 624; Hemingway's 1917, § 384; 1930, § 433; 1942, § 1353.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Claim for damages.
3. On appeal.
4. Independent action on bond.
5. Award of damages.
6. —Measure of damages.
7. —Attorney fees.

1. In general.

Renewal lessee of rural school lands was entitled to recover damages against the original lessee who held over under an injunction after the expiration of the original lease, where the renewal lessee was compelled to pay a monthly rental which would have been avoided had he not been enjoined from occupying the premises. Smith v. Young, 199 Miss. 658, 24 So. 2d 746, 1946 Miss. LEXIS 237 (Miss.), modified, 199 Miss. 658, 25 So. 2d 136, 1946 Miss. LEXIS 238 (Miss. 1946).

Dismissal of suit in which temporary injunction had been issued entitled defendants to damages on the bond. Alexander v. Woods, 115 Miss. 164, 75 So. 772, 1917 Miss. LEXIS 187 (Miss. 1917).

If the bill is solely for an injunction, damages should be at once awarded upon its dissolution. Derdeyn v. Donovan, 81 Miss. 696, 33 So. 652, 1902 Miss. LEXIS 204 (Miss. 1902).

Dismissal of bill establishes that injunction was wrongfully sued out, and that defendant is entitled to damages sustained by issuing of injunction. Yale v. Baum, 70 Miss. 225, 11 So. 879, 1892 Miss. LEXIS 80 (Miss. 1892); Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

2. Claim for damages.

Where defendant has answered and claimed specified damages, he is entitled to have them established in that suit and cannot be deprived of this right by the voluntary dismissal by complainant of the bill. Canadian & A. Mortg. & Trust Co. v. Fitzpatrick, 71 Miss. 347, 14 So. 270, 1893 Miss. LEXIS 165 (Miss. 1893).

3. On appeal.

Since there is no provision authorizing the Supreme Court to initially hear and take evidence on a motion for the allowance of damages on the dissolution of an injunction and to fix and award such damages where no award of damages on the dissolution of the injunction has been made in the lower court, a motion for the allowance of damages was overruled. Machine Prods. Co. v. Prairie Local Lodge, 230 Miss. 809, 95 So. 2d 763, 1957 Miss. LEXIS 427 (Miss. 1957).

Damages for wrongful issuance of injunction may be allowed on appeal. Brooks-Scanlon Co. v. Stogner, 114 Miss. 736, 75 So. 596, 1917 Miss. LEXIS 92 (Miss. 1917).

4. Independent action on bond.

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

That defendants were not damaged, but were only restrained from proceeding in unlawful manner, held no defense in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Members of political party could sue as individuals for expenses incurred as result of wrongful issuance of injunction restraining holding of primary elections and conventions. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Expenses not shown to be necessary and not properly separated from expenses incurred before issuance of injunction could not be allowed in action on injunction bond. Johnson v. Howard, 167 Miss. 475, 141 So. 573, 1932 Miss. LEXIS 194 (Miss. 1932).

Action on injunction bond does not lie until final decree dismissing bill. Vicksburg Waterworks Co. v. Vicksburg, 99 Miss. 132, 54 So. 852, 1910 Miss. LEXIS 26 (Miss. 1910).

Actions on injunction-bonds are not maintainable until the final disposition of the causes in which they were given. Yazoo & M. V. R. Co. v. Adams, 78 Miss. 977, 30 So. 44, 1901 Miss. LEXIS 152 (Miss. 1901).

The right to sue at law on the bond is not affected by the failure of the chancery court to assess damages. Barber v. Levy, 73 Miss. 484, 18 So. 797, 1895 Miss. LEXIS 100 (Miss. 1895).

If proof of damages claimed under the statute be insufficient, it is not error to disallow the claim without prejudice to a suit on the bond. Davis v. Hart, 66 Miss. 642, 6 So. 318, 1889 Miss. LEXIS 159 (Miss. 1889).

The section [Code 1942, § 1353] does not authorize an independent suit on the bond before final decree. Goodbar & Co. v. Dunn, 61 Miss. 624, 1884 Miss. LEXIS 143 (Miss. 1884).

5. Award of damages.

Motocross racing track owner was not entitled to money damages under Miss.

Code Ann. § 11-13-37 where the owner did not file a motion to dissolve or modify either the TRO or preliminary injunction enjoining him from holding racing events and instead allowed them to expire on their own terms, and the record contained substantial credible evidence to support the chancellor's issuance of both the TRO and the preliminary injunction and to support her finding that neither the TRO nor the preliminary injunction ever wrongfully enjoined the owner. Lauderdale v. Desoto Cnty., 196 So. 3d 1091, 2016 Miss. App. LEXIS 456 (Miss. Ct. App. 2016).

Damages may be awarded on bond upon dissolution of injunction where injunction is only relief sought, but where injunction is merely ancillary, award of damages should await termination of suit. Staple Cotton Co-op. Ass'n v. Borodofsky, 139 Miss. 368, 104 So. 91, 1925 Miss. LEXIS 141 (Miss. 1925).

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be rendered against obligors on injunction bond for amount of the judgment or debt, but only for such damages as defendant may have sustained. Gotelli v. Fountain, 127 Miss. 577, 90 So. 250, 1921 Miss. LEXIS 260 (Miss. 1921).

A decree dissolving an injunction and awarding damages is interlocutory. Wilson v. Pugh, 61 Miss. 449, 1884 Miss. LEXIS 108 (Miss. 1884).

6. —Measure of damages.

This section [Code 1942, § 1353], in providing that a person enjoined could have his damages ascertained in the proceeding in which the injunction was granted, does not allow an additional security for damages over and above the face amount of the bond. Broome v. Hattiesburg Bldg. & Trades Council, 206 So. 2d 184, 1967 Miss. LEXIS 1243 (Miss. 1967).

Damages from injunction preventing delivery of lumber is difference in value when injunction sued out and when dissolved, with interest on the difference for intervening period. Thornton-Claney Lumber Co. v. J. M. O'Quin & Sons, 115 Miss. 857, 76 So. 732, 1917 Miss. LEXIS 271 (Miss. 1917).

7. —Attorney fees.

Chancellor abused her discretion in awarding a motocross racing track owner attorney's fees under Miss. Code Ann. § 11-13-37 (Rev. 2004) and Miss. R. Civ. P. 65(c) where the record reflected that no permanent injunction ever issued on the county's amended application for such relief, substantial credible evidence supported the TRO and the preliminary injunction enjoining the owner from holding racing events in violation of a conditional use permit, and thus, the record reflected that the owner was never wrongfully enjoined or restrained. Lauderdale v. Desoto Cnty., 196 So. 3d 1091, 2016 Miss. App. LEXIS 456 (Miss. Ct. App. 2016).

Vendor and a former employee of a company in the pipeline services business were entitled to an award of attorneys' fees and expenses because the company filed its application for a preliminary injunction against them frivolously and in bad faith, regardless of the amount of the injunction bond posted by the company. Expro Ams., LLC v. Walters, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

Chancellor was well within his authority to award attorney's fees and damages to property owners where the city initiated the action to have the owners remove the fence from their own property, and the owners were forced to hire attorneys, hire surveyors, and incur expenses, while doing nothing to violate the city's rights; thus, the city was responsible for the expenses the owners incurred. City of Waynesboro v. McMichael, 856 So. 2d 474, 2003 Miss. App. LEXIS 285 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 848 (Miss. 2003).

When injunction is sought as ancillary remedy to other relief and hearing on injunction is not had upon motion to dissolve separate and apart from hearing upon merits, no counsel fees will be allowed. Coleman v. Lucas, 206 Miss. 274, 39 So. 2d 879, 1949 Miss. LEXIS 260 (Miss. 1949).

When whole relief sought is controlled by injunction and any incidental relief flows from and is dependent upon retaining injunction, allowance of solicitor's fees upon dissolution of injunction is entirely proper. Coleman v. Lucas, 206 Miss. 274,

39 So. 2d 879, 1949 Miss. LEXIS 260 (Miss. 1949).

Solicitor's fees are not properly awarded where injunction is ancillary to other relief asked and where the entire matter is heard upon the merits. Smith v. Young, 199 Miss. 658, 24 So. 2d 746, 1946 Miss. LEXIS 237 (Miss.), modified, 199 Miss. 658, 25 So. 2d 136, 1946 Miss. LEXIS 238 (Miss. 1946).

Supreme Court was without power to transfer an award of solicitor's fees erroneously awarded on dissolution of injunction in suit by former lessee of rural school lands to compel reopening of the matter of a renewal lease of the same lands granted to another, as a credit upon actual damages sustained by the renewal lessee by virtue of the injunction, even though such damages were erroneously disallowed by the trial court. Smith v. Young, 199 Miss. 658, 24 So. 2d 746, 1946 Miss. LEXIS 237 (Miss.), modified, 199 Miss. 658, 25 So. 2d 136, 1946 Miss. LEXIS 238 (Miss. 1946).

Defendant was not entitled to attorney's fees even though dissolution of an injunction was procured, where the suit was both for injunctive relief and the recovery of damages, and the motion to dissolve the injunction was not heard in advance of the trial on the merits. Capital Electric Power Ass'n v. Franks, 199 Miss. 226, 23 So. 2d 922, 1945 Miss. LEXIS 283 (Miss. 1945).

Allowance to county law enforcement officers of counsel fees in the sum of $800 in final decree dissolving injunction against the holding of an election to determine whether the transportation, etc. of wines and beer should be excluded from the county, did not constitute an abuse of discretion. Sparks v. Reddoch, 196 Miss. 609, 18 So. 2d 450, 1944 Miss. LEXIS 241 (Miss. 1944).

Amount of solicitor's fees in dissolving wrongful injunction is left to chancellor's discretion. New Orleans, M. & C. R. Co. v. Martin, 105 Miss. 230, 62 So. 228, 1913 Miss. LEXIS 196 (Miss. 1913); Sparks v. Reddoch, 196 Miss. 609, 18 So. 2d 450, 1944 Miss. LEXIS 241 (Miss. 1944).

Where complainant, a construction company, filed a bill in chancery to obtain an injunction against a city to prevent its awarding a construction contract to another construction firm because the complainant was the lowest and best bidder, and also filed an application with a supreme court judge to issue a temporary injunction to preserve the status quo until the time of the hearing, at the same time also obtaining a restraining order of the chancery court, and at the hearing before the supreme court judge the application for temporary injunction was denied, and thereafter a bill of complaint in the chancery court was dismissed in view of the fact that the city had in the meantime awarded the contract to the complainant, the allowance to the city of attorney's fees as damages arising out of the suit for the temporary injunction and dissolution thereof was erroneous. Edward E. Morgan Co. v. Natchez, 188 Miss. 781, 196 So. 251, 1940 Miss. LEXIS 72 (Miss. 1940).

Attorney's fees not element of defendant's damages for wrongful issuance of injunction merely ancillary to relief sought in bill of complaint. Staple Cotton Co-op. Ass'n v. Buckley, 141 Miss. 483, 106 So. 747, 1926 Miss. LEXIS 440 (Miss. 1926).

Attorney's fees not allowed where dissolution of injunction not sought until trial on merits. Howell v. McLeod, 127 Miss. 1, 89 So. 774, 1921 Miss. LEXIS 194 (Miss. 1921).

Attorney's fees not allowable on dissolution of injunction to enforce illegal agreement. Lowenburg v. Klein, 125 Miss. 284, 87 So. 653, 1921 Miss. LEXIS 121 (Miss. 1921).

Attorney's fees for defending suit on merits not allowable as damages when injunction is a mere incident thereto. Mims v. Swindle, 124 Miss. 686, 87 So. 151, 1920 Miss. LEXIS 557 (Miss. 1920); Hunter v. Hankinson, 141 Miss. 279, 106 So. 514, 1925 Miss. LEXIS 229 (Miss. 1925).

Attorney's fees recoverable for wrongful suing out of injunction do not include services in assessing damages after dissolution of the injunction. Thornton-Claney Lumber Co. v. J. M. O'Quin & Sons, 115 Miss. 857, 76 So. 732, 1917 Miss. LEXIS 271 (Miss. 1917).

Upon dissolution of injunction against foreclosure of trust deed obtained after advertisement, defendant was entitled to recover counsel fee and printer's fees for the advertisement. Gulfport Land Improv. Co. v. Augur, 95 Miss. 292, 48 So. 722 (Miss. 1909).

Upon dissolution of injunction, defendant entitled to attorney's fees for services in both trial and appellate courts. Curphy & Mundy v. Terrell, 89 Miss. 624, 42 So. 235, 1906 Miss. LEXIS 22 (Miss. 1906).

RESEARCH REFERENCES

ALR.

Necessary defendants in independent action on injunction bond. 55 A.L.R.2d 545.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 A.L.R.4th 273.

Am. Jur.

42 Am. Jur. 2d, Injunctions §§ 315-296–316.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 111-119 (Action for wrongful issuance of injunction; recovery on injunction bond).

§ 11-13-39. Effect of dissolution of injunction on bill of complaint.

When, on motion, an injunction shall be wholly dissolved, the bill of complaint shall be dismissed of course with costs, unless sufficient cause be shown against its dismissal at the next succeeding term of the court.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 2(40); 1857, ch. 62, art. 69; 1871, § 1048; 1880, § 1917; 1892, § 570; 1906, § 621; Hemingway's 1917, § 381; 1930, § 434; 1942, § 1354.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Time for dismissal.
3. Appeal.

1. In general.

It is error, on dissolving injunction on motion and demurrer to bill, to at once enter judgment on injunction bond. Bullen v. Smith, 146 Miss. 316, 111 So. 454, 1927 Miss. LEXIS 190 (Miss. 1927).

An order dissolving an injunction, on motion for that purpose, does not of itself dismiss the bill. Pickle v. Holland, 24 Miss. 566, 1852 Miss. LEXIS 101 (Miss. 1852).

2. Time for dismissal.

Dismissal of complaint upon sustaining demurrer thereto and dissolving injunction held not prejudicial. Evans v. Money, 104 Miss. 264, 61 So. 309, 1913 Miss. LEXIS 26 (Miss. 1913).

Where the bill is filed solely for an injunction, the dissolution of the injunction carries with it the dismissal of the bill. Otherwise, the bill is retained until final hearing. Derdeyn v. Donovan, 81 Miss. 696, 33 So. 652, 1902 Miss. LEXIS 204 (Miss. 1902).

The object of the statute is to give the complainant an opportunity to amend or to take further proof; but where the case is disposed of on its merits, both sides having taken their proofs, the case can be dismissed at once. Bass v. Nelms, 56 Miss. 502, 1879 Miss. LEXIS 154 (Miss. 1879).

On mere motion to dissolve, on bill and answer, it is error, on sustaining the motion, to dismiss the bill at once. Drane v. Winter, 41 Miss. 517, 1867 Miss. LEXIS 23 (Miss. 1867); Guion v. Pickett, 42 Miss. 77, 1868 Miss. LEXIS 35 (Miss. 1868), limited, Jones v. Salmon, 128 Miss. 508, 91 So. 199, 1922 Miss. LEXIS 139 (Miss. 1922); Maury v. Smith, 46 Miss. 81, 1871 Miss. LEXIS 134 (Miss. 1871).

3. Appeal.

Strong v. Harrison, 62 Miss. 61, 1884 Miss. LEXIS 18 (Miss. 1884).

Decree directing dismissal of bill in vacation on sustaining demurrer held not prejudicial, where decision on demurrer practically amounted to final disposition, and appellants declined to amend or plead further, but prayed for and were granted appeal. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Decree vacating temporary injunction and dismissing bill was final and appealable. Anderson v. Henderson, 103 Miss. 211, 60 So. 137, 1912 Miss. LEXIS 157 (Miss. 1912).

RESEARCH REFERENCES

CJS.

43A C.J.S., Injunctions § 391.

§ 11-13-41. Victims of stalking and sexual assault exempt from payment of fees related to filing for injunctive relief.

(1) A victim of stalking, as defined in Section 97-3-107, or sexual assault, as defined in Section 97-3-65 or 97-3-95, who files an action seeking injunctive relief preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to the victim against the perpetrator of that offense, shall not be assessed any fees related to the filing of such request, the issuance of any process of court or the issuance of any order providing such protection.

(2) The court, upon issuing any such relief, shall assess costs of court to the perpetrator of the offense. In the event the court determines the request is frivolous, the court shall assess the costs of court to the petitioner.

HISTORY: Laws, 2009, ch. 412, § 1, eff from and after passage (approved Mar. 20, 2009).

Cross References — Waiver of filing fees for petition to seek relief in domestic abuse cases, see § 93-21-7.

CHAPTER 15.

ARBITRATION AND AWARD

In General. 11-15-1
Arbitration of Controversies Arising from Construction Contracts and Related Agreements. 11-15-101

IN GENERAL

Sec.
11-15-1. Who may submit to arbitration.
11-15-3. Qualifications of arbitrators.
11-15-5. Arbitrators to appoint time of meeting and notify parties.
11-15-7. Notice to parties; form.
11-15-9. Arbitrators to be sworn.
11-15-11. Arbitrators' meetings; procedure.
11-15-13. Swearing of witnesses.
11-15-15. Service of process.
11-15-17. Contempt.
11-15-19. Award enforcement process.
11-15-21. Confirmation of award by court.
11-15-23. Vacation of award; grounds.
11-15-25. Correction of award.
11-15-27. Motion to vacate or modify award; when made.
11-15-29. Application to vacate or modify award; new hearing.
11-15-31. Judgments; when and how rendered.
11-15-33. Costs; how taxed and collected.
11-15-35. Pending suits may be arbitrated.
11-15-37. Construction of chapter.

§ 11-15-1. Who may submit to arbitration.

All persons, except infants and persons of unsound mind, may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be existing between them, which might be the subject of an action, and may, in such submission, agree that the court having jurisdiction of the subject matter shall render judgment on the award made pursuant to such submission. In such case, however, should the parties agree upon a court without jurisdiction of the subject matters of the award, the judgment shall be rendered by the court having jurisdiction in the county of the residence of the party, or some one of them, against whom the award shall be made.

HISTORY: Codes, 1892, § 95; 1906, § 96; Hemingway's 1917, § 83; 1930, § 81; 1942, § 279.

Cross References — Definition of the term "infant," see § 1-3-21.

Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Partition of property by arbitration, see § 11-21-1.
Arbitration of motor vehicle dealer contracts, see § 63-17-133.
Arbitration with state highway department, see § 65-1-91.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Subjects of arbitration.
3. Persons who may submit to arbitration.
4. Jurisdiction of courts.
5. Revocation of submission before award.

1. In general.

Law client's fee dispute with a law firm that had previously represented her was subject to arbitration pursuant to Miss. Code Ann. § 11-15-1 where the legal services contracts contained arbitration clauses that were valid and enforceable, the fee dispute was within the scope of arbitration, and there was no procedural unconscionability or other legal constraint that precluded enforcement of the arbitration clause. Slater-Moore v. Goeldner, 113 So. 3d 521, 2013 Miss. LEXIS 149 (Miss. 2013).

An arbitrator is not required to make separate or detailed findings as to the reasons for an arbitration award. When parties agree to arbitration, they contract for an award without a formal, reasoned opinion and, more specifically, without findings of fact or conclusions of law. Absent a contractual agreement to the contrary, the parties waive any right to an explanation or clarification. Craig v. Barber, 524 So. 2d 974, 1988 Miss. LEXIS 214 (Miss. 1988).

Declaration in suit on award in arbitration which alleges the material facts in reference thereto, and makes as exhibits the contract, the agreement to arbitrate and award thereon, held to state cause of action. Stout v. W. M. Garrard & Co., 128 Miss. 418, 91 So. 33, 1922 Miss. LEXIS 125 (Miss. 1922).

The legal effect of arbitration agreement and finding therein is to make a compromise settlement of the matters in dispute, and the effect thereof is to merge the original causes of action and defenses into the written award and make that the conclusive source of rights and liabilities of the parties. Yarbro v. Purser, 114 Miss. 75, 74 So. 425, 1917 Miss. LEXIS 1 (Miss. 1917).

In action on contract it was error to exclude arbitration agreement and finding of arbitrators. Yarbro v. Purser, 114 Miss. 75, 74 So. 425, 1917 Miss. LEXIS 1 (Miss. 1917).

2. Subjects of arbitration.

Arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law as well as the facts applicable to the case submitted to them; and in the absence of a reservation in the submission, the parties are presumed to agree that every question both as to law and fact necessary for the decision is to be included in the arbitration. Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 1874 Miss. LEXIS 57 (Miss. 1874).

Whether the arbitrators exceeded their power in making an award involves the question of what power was conferred upon them by the agreement of submission. Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 1874 Miss. LEXIS 57 (Miss. 1874).

3. Persons who may submit to arbitration.

Parties to a construction agreement, as a matter of right to contract, may in advance bind themselves to compulsory arbitration of disputes that arise between them. Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

The guardian may submit the controversy of his ward in matters in which he is authorized to give acquittances. Goleman v. Turner, 22 Miss. 118, 1850 Miss. LEXIS 109 (Miss. 1850); McComb v. Turner, 22 Miss. 119, 1850 Miss. LEXIS 110 (Miss. 1850).

The guardian may submit the controversy of his ward in matters in which he is authorized to give acquittances. Goleman v. Turner, 22 Miss. 118, 1850 Miss. LEXIS 109 (Miss. 1850); McComb v. Turner, 22 Miss. 119, 1850 Miss. LEXIS 110 (Miss. 1850).

A guardian ad litem cannot bind his ward by submitting the suit to arbitration. Fort v. Battle, 21 Miss. 133, 1849 Miss. LEXIS 153 (Miss. 1849).

An attorney at law, as such, has no power to submit his client's controversy which is not in suit to arbitration. Jenkins v. Gillespie, 18 Miss. 31, 1848 Miss. LEXIS 49 (Miss. 1848).

4. Jurisdiction of courts.

The jurisdiction of a court of equity to enforce specific performance of awards involves the exercise of its ordinary jurisdiction as applied to the specific performance of agreements and not the exercise of any jurisdiction peculiar to awards, and accordingly many, if not all, the principles applicable to ordinary suits of that nature must apply. Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 1874 Miss. LEXIS 57 (Miss. 1874).

While a court of equity will not interfere to enforce an award involving merely the payment of money, there being an adequate remedy at law in such case, a court of equity has jurisdiction to enforce specific execution of an award concerning real estate or of an agreement for the purchase and sale of real estate, notwithstanding that it involves the enforcement of an award to pay money. Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 1874 Miss. LEXIS 57 (Miss. 1874).

5. Revocation of submission before award.

Chancery court erred in ordering specific enforcement of a clause in a collective bargaining agreement between a company and the union which provided for arbitration of future disputes, since the effect of the company's refusal to submit the matters to arbitration was to revoke the arbitration clause insofar as it applied to the disputes involved in the action. Machine Prods. Co. v. Prairie Local Lodge, 230 Miss. 809, 95 So. 2d 763, 1957 Miss. LEXIS 427 (Miss. 1957).

Either party to a written agreement for submission to arbitration has the right to revoke the submission before award is made, regardless of whether the submission was by deed, or that the agreement contained a provision against revocability, or that valuable consideration was given for the agreement. Jones v. Harris, 59 Miss. 214, 1881 Miss. LEXIS 105 (Miss. 1881), overruled, IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 1998 Miss. LEXIS 124 (Miss. 1998).

OPINIONS OF THE ATTORNEY GENERAL

There is no requirement that a binding arbitration provision be incorporated as a part of a standard insurance policy form. Dale, March 17, 2000, A.G. Op. #2000-0100.

A metropolitan sewer authority is not a person as defined by § 1-3-39 and, therefore, is not capable of entering into agreements for binding arbitration under § 11-15-1. Clark, Apr. 26, 2002, A.G. Op. #02-0184.

The West Rankin Metropolitan Sewer Authority does not have specific authority in its enabling legislation or general legislation to enter into binding arbitration agreements; however, it may seek amendment of the local and private act by the legislature to include the authority to enter into binding arbitration agreements in specific circumstances. Clark, June 7, 2002, A.G. Op. #02-0295.

RESEARCH REFERENCES

ALR.

Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him. 50 A.L.R.2d 1268.

Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Arbitration of disputes within close corporation. 64 A.L.R.2d 643.

Application of provisions of arbitration statutes excluding contracts for labor or services. 64 A.L.R.2d 1336.

Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Necessity that arbitrators, make specific or detailed findings of fact or conclusions of law. 82 A.L.R.2d 969.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 A.L.R.3d 1008.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony for support payments, or child visitation or custody matters. 18 A.L.R.3d 1264.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein. 32 A.L.R.3d 377.

Comment Note: Determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted. 36 A.L.R.3d 649.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Statute of limitations as bar to arbitration under agreement. 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services. 95 A.L.R.3d 1145.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein. 98 A.L.R.3d 767.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 A.L.R.4th 652.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract. 11 A.L.R.4th 774.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Arbitration agreement or other private contract as precluding filing of unfair labor practice charges with National Labor Relations Board. 6 A.L.R. Fed. 272.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 18- 27.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 1 et seq.

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:21 et seq. (future disputes; agreements and contract provisions).

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:123 et seq. (present disputes; submission).

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:133-23:155, 23:172-23:176 (Present disputes).

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:146 (present disputes-filing agreement for arbitration with clerk of appropriate court).

27 Am. Jur. Trials 621, Resolving Real Estate Disputes Through Arbitration.

44 Am. Jur. Trials 507, Alternative Dispute Resolution: Commercial Arbitration.

46 Am. Jur. Trials 231, Alternative Dispute Resolution for Banks and Other Financial Institutions.

CJS.

6 C.J.S., Arbitration §§ 32–34.

Law Reviews.

An Overview of Mississippi's Construction Arbitration Act. 53 Miss. L. J. 501, September, 1983.

§ 11-15-3. Qualifications of arbitrators.

A person shall not act as an arbitrator where he is interested in the subject matter in dispute, nor where he is related, by consanguinity or affinity, to any of the parties to the arbitration.

HISTORY: Codes, 1892, § 96; 1906, § 97; Hemingway's 1917, § 84; 1930, § 82; 1942, § 280.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 109- 119.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 51 et seq.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS.

6 C.J.S., Arbitration §§ 136–141, 143.

§ 11-15-5. Arbitrators to appoint time of meeting and notify parties.

The arbitrators selected by agreement of the parties shall appoint a time and place for the hearing, and notify the parties thereof, and shall adjourn the hearing from time to time, as may be necessary, and on the application of either party, and for good cause may postpone the hearing to a time not extending beyond the day fixed in the submission, if a day be fixed, for rendering the award.

HISTORY: Codes, 1892, § 97; 1906, § 98; Hemingway's 1917, § 85; 1930, § 83; 1942, § 281.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR.

Allowance, in replevin action, of loss of profits from deprivation of use of detained property. 48 A.L.R.2d 1053.

§ 11-15-7. Notice to parties; form.

The notice which the arbitrators shall give to the parties of the time and place of the hearing of the controversy shall be in writing, and may be in the following form, viz:

"To ________ and ________ and ________ [naming all of the parties]

"You are notified that the undersigned arbitrators, agreed upon by you to determine the controversy mentioned in your articles of submission, of date the ________ day of ________ A.D. ________ , have fixed upon and will hear and consider your said controversy on the ________ day of ________ A.D. ________ , at ________

"________________

"________________

"________________

"Arbitrators."

Such notice shall be served by delivering to each of the parties a copy thereof at least one whole day before the hearing, and shall be given to the parties by one of the arbitrators, who shall indorse on said notice that he has served the same by giving the party or parties so served a true copy thereof; but, if the parties appear, the want of notice shall not affect the proceedings.

HISTORY: Codes, 1892, § 98; 1906, § 99; Hemingway's 1917, § 86; 1930, § 84; 1942, § 282.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Where the parties to an arbitration appeared by counsel at the hearing before the arbitrators, it is immaterial that the record fails to show that they were notified to so appear. Mississippi Cotton Oil Co. v. Buster, 84 Miss. 91, 36 So. 146, 1904 Miss. LEXIS 12 (Miss. 1904).

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolutions §§ 134, 136- 147.

CJS.

6 C.J.S., Arbitration §§ 177.

§ 11-15-9. Arbitrators to be sworn.

Before proceeding to hear any testimony in relation to the matter, the arbitrators shall be sworn, by some officer authorized to administer an oath, to faithfully and impartially hear and determine the matters submitted to them, according to the evidence and the manifest justice and equity of the case, to the best of their judgment, without favor or affection.

HISTORY: Codes, 1892, § 99; 1906, § 100; Hemingway's 1917, § 87; 1930, § 85; 1942, § 283.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 137, 138.

CJS.

6 C.J.S., Arbitration § 144.

§ 11-15-11. Arbitrators' meetings; procedure.

All arbitrators must meet together and hear all of the allegations and evidence of the parties pertinent or material to the cause; but the parties may mutually waive, in writing, the appearance of all of the arbitrators named in the articles of submission and consent for those present to proceed, or they may, in like manner, substitute other persons for the absent one. An award made, and every other act done, by a majority of the arbitrators shall be valid, unless the concurrence of all or a certain number of the arbitrators to the award or acts be expressly required in the submission.

HISTORY: Codes, 1892, § 100; 1906, § 101; Hemingway's 1917, § 88; 1930, § 86; 1942, § 284.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

All arbitrators must participate, but majority may make award. Stout v. W. M. Garrard & Co., 128 Miss. 418, 91 So. 33, 1922 Miss. LEXIS 125 (Miss. 1922).

On matters agreed to be submitted to three arbitrators, an award made on the investigation of only two is void. Harvin v. Denton, 87 Miss. 238, 39 So. 456, 1905 Miss. LEXIS 108 (Miss. 1905).

Whether the arbitrators exceeded their power in making an award involves the question of what power was conferred upon them by the agreement of submission. Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 1874 Miss. LEXIS 57 (Miss. 1874).

RESEARCH REFERENCES

ALR.

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Modern status of rules respecting concurrence of all arbitrators as condition of binding award under private agreement not specifying unanimity. 83 A.L.R.3d 996.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 150 et seq.

CJS.

6 C.J.S., Arbitration §§ 174, 175, 192.

§ 11-15-13. Swearing of witnesses.

All witnesses before arbitrators shall be sworn as if before a court, and the parties shall have the benefit of legal process to compel the attendance of witnesses, which may be issued by the clerk of any court or a justice of the peace, and shall require the witness to attend before the arbitrators on a day and at a place certain to be named in the subpoena.

HISTORY: Codes, 1892, § 101; 1906, § 102; Hemingway's 1917, § 89; 1930, § 87; 1942, § 285.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Forms 61 et seq.

CJS.

6 C.J.S., Arbitration §§ 188, 189.

§ 11-15-15. Service of process.

Process returnable to the arbitrators may be served as provided for in the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1892, § 102; 1906, § 103; Hemingway's 1917, § 90; 1930, § 88; 1942, § 286; Laws, 1991, ch. 573, § 31, eff from and after July 1, 1991.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR.

Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action. 33 A.L.R.4th 790.

§ 11-15-17. Contempt.

If any person duly subpoenaed to appear before arbitrators and testify, shall fail to do so, he shall be guilty of contempt of the court from which, or by whose clerk, the process issued, and upon complaint thereto of the party injured, the court or justice may punish the person for such contempt as in other like cases.

HISTORY: Codes, 1892, § 103; 1906, § 104; Hemingway's 1917, § 91; 1930, § 89; 1942, § 287.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR.

Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action. 33 A.L.R.4th 790.

§ 11-15-19. Award enforcement process.

To entitle an award to be enforced according to the provisions of this chapter, it must be made in writing, and be signed by the arbitrators making the same and who concur therein. The arbitrators shall attach to the award the articles of submission, the notice served on the parties, with indorsements of service, and, if the parties appear, that fact should be noted in the award itself; and they shall give a duplicate of the whole to each of the parties to the controversy, and the duplicates shall each be treated as originals.

HISTORY: Codes, 1892, § 104; 1906, § 105; Hemingway's 1917, § 92; 1930, § 90; 1942, § 288.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

In a mobile home owner's suit over alleged defects in materials and workmanship, although no document entitled "articles of submission" was in the record or the procedure for affirming the arbitrator's award in favor of the mobile home seller, manufacturer, and creditor, the substance of each requirement of Miss. Code Ann. § 11-15-19 (1972) was found within the record and the findings of fact the arbitrator submitted to the trial court. Margerum v. Bud's Mobile Homes, Inc., 823 So. 2d 1167, 2002 Miss. LEXIS 252 (Miss. 2002).

The award is an extinguishment of all causes of action submitted. Jones v. Harris, 58 Miss. 293, 1880 Miss. LEXIS 124 (Miss. 1880).

Where the arbitrators reduce their findings to writing and sign them in each other's presence at the same time and place, it is competent for counsel to agree that the award so drawn may afterwards be put in proper form, and in such case it is no objection to the formal award that it was not signed by the arbitrators at the same time and place. Jones v. Harris, 58 Miss. 293, 1880 Miss. LEXIS 124 (Miss. 1880).

It is essential to the validity of an award that it shall be final and complete, responsive to all the matters of difference included in the submission. (Said of a common law award.) Rhodes v. Hardy, 53 Miss. 587, 1876 Miss. LEXIS 120 (Miss. 1876).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev ed), Arbitration and Award, Form 91.01 (Award; subsequent proceedings).

CJS.

6 C.J.S., Arbitration §§ 193, 194.

§ 11-15-21. Confirmation of award by court.

Upon presentation of the articles of submission and the award to the court designated in the submission or the court having jurisdiction of the subject matter of the award, the court shall, upon motion, confirm the award, unless the same be vacated or modified, or a decision thereon be postponed, as hereinafter provided. An award shall not be confirmed unless notice in writing of such motion shall have been served on the adverse party at least five days before the hearing, to be served as other process; but such motion shall not be made after the expiration of one year from the making and publication of the award.

HISTORY: Codes, 1892, § 105; 1906, § 106; Hemingway's 1917, § 93; 1930, § 91; 1942, § 289.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137, 2013 Miss. App. LEXIS 781 (Miss. Ct. App. 2013).

In a mobile home owner's suit over alleged defects in materials and workmanship, although no document entitled "articles of submission" was in the record or the procedure for affirming the arbitrator's award in favor of the mobile home seller, manufacturer, and creditor, the substance of each requirement of Miss. Code Ann. § 11-15-19 (1972) was found within the record and the findings of fact the arbitrator submitted to the trial court. Margerum v. Bud's Mobile Homes, Inc., 823 So. 2d 1167, 2002 Miss. LEXIS 252 (Miss. 2002).

RESEARCH REFERENCES

ALR.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 101 et seq.

CJS.

6 C.J.S., Arbitration §§ 245, 246.

§ 11-15-23. Vacation of award; grounds.

Any party complaining of an award may move the court to vacate the same upon any of the following grounds:

(a) That such award was procured by corruption, fraud, or undue means;

(b) That there was evident partiality or corruption on the part of the arbitrators, or any one of them;

(c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy, or other misbehavior by which the rights of the party shall have been prejudiced;

(d) That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.

HISTORY: Codes, 1892, § 106; 1906, § 107; Hemingway's 1917, § 94; 1930, § 92; 1942, § 290.

Cross References — Motion to vacate award, see § 11-15-27.

Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Prohibition against arbitrators accepting bribes, see § 97-9-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Specific grounds for vacating award.
3. Impeachment of award.
4. Contractual expansion of appeal rights.

1. In general.

Standard by which an appellate court reviews a trial court's order confirming an arbitration award under the Federal Arbitration Act (FAA) is that questions of law are reviewed de novo and findings of fact are reviewed only for clear error; the State arbitration act presents nearly identical requirements and exceptions for review, and the supreme court embraces this standard of review to evaluate properly the application of the statutes, while reviewing the trial court's actions for error. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Circuit court did not err by denying a client's motion to vacate an arbitration award because it properly found that the arbitrator did not exceed his powers; the circuit court concluded nothing in the record indicated that he refused or failed to review the case law, nothing indicated he had any preconceived notions or opinions, and nothing indicated what evidence he focused on or did not focus on. Paige Elec. Co. v. Davis & Feder, P.A., 231 So. 3d 201, 2017 Miss. App. LEXIS 200 (Miss. Ct. App.), cert. denied, 229 So. 3d 122, 2017 Miss. LEXIS 490 (Miss. 2017).

Circuit judge committed reversible error by denying an employer's motion to confirm an arbitration award and for entry of a judgment because the arbitration award did not fall under any of the four instances that would have allowed the award to be vacated. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137, 2013 Miss. App. LEXIS 781 (Miss. Ct. App. 2013).

It is not legitimate, in exceptions to an arbitration award, to inquire into the original merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a party challenges the evidentiary basis for a trial court's decision. Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

Only grounds for setting an arbitration award aside are grounds prescribed by this section [Code 1942, § 290]. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in this section [Code 1942, § 290] and Code 1942, § 291. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Either party to a written agreement for submission to arbitration has the right to revoke the submission before award is made, regardless of whether the submission was by deed, or that the agreement contained a provision against revocability, or that valuable consideration was given for the agreement. Jones v. Harris, 59 Miss. 214, 1881 Miss. LEXIS 105 (Miss. 1881), overruled, IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 1998 Miss. LEXIS 124 (Miss. 1998).

2. Specific grounds for vacating award.

Circuit court properly confirmed an arbitration award entered in favor of an employer because the employees failed to prove that the arbitrator was guilty of misconduct since a phone call between the arbitrator and the employees' attorney was not substantial or material; Chalk v. Regions Ins., Inc., 181 So. 3d 970, 2015 Miss. LEXIS 500 (Miss. 2015).

Circuit court properly confirmed an arbitration award entered in favor of an employer because employees failed to show how an arbitration award was procured by undue means. Chalk v. Regions Ins., Inc., 181 So. 3d 970, 2015 Miss. LEXIS 500 (Miss. 2015).

Arbitrator did not exceed his powers because employees agreed to restrictive covenants, to the damages formula, and to arbitrate the employer's claims that they had breached the covenants and owed damages under the formula, and the employees fully participated in the arbitration; the employees waived the right to object because they agreed that the formula was one for liquidated damages, a legal remedy and thus, within the arbitrator's power to award. Chalk v. Regions Ins., Inc., 181 So. 3d 970, 2015 Miss. LEXIS 500 (Miss. 2015).

Mississippi's statute governing judicial review of arbitrator's decisions, Miss. Code Ann. § 11-15-23 (Rev. 2004), leaves no room for the application of the Doctrine of Manifest Disregard; even if the arbitrator mistakenly refused to consider parol evidence of a term of a settlement agreement, such error was insufficient to constitute undue means or an exceeding of the arbitrator's powers as required by § 11-15-23. Robinson v. Henne, 115 So. 3d 797, 2013 Miss. LEXIS 352 (Miss. 2013).

Chancellor erred in setting aside an arbitration award because, although undue means and unresolved issues could be valid reasons for setting aside an award, the chancellor's order failed to articulate any "undue means" utilized or any specific deficiencies with the arbitrators' thorough analysis and valuation methods. Bailey Brake Farms, Inc. v. Trout, 116 So. 3d 1064, 2013 Miss. LEXIS 303 (Miss. 2013).

Because the valuation was an arbitration award, as contemplated by the legally valid and binding contract, it was binding on the parties absent very narrow circumstances which were prescribed by Miss. Code Ann. § 11-15-23, and long standing Mississippi jurisprudence provided that every reasonable presumption would be indulged in favor of the validity of arbitration proceedings. Although the chancellor cited "undue means" and an incomplete award as justifications for judicial review, he provided insufficient explanation for those conclusions, which the court found were unsupported by the record; therefore, because the chancery court was without the authority to set aside the arbitrators' decision, the chancery court's judgment was reversed and the court reinstated the arbitration award. Bailey Brake Farms, Inc. v. Trout, 2013 Miss. LEXIS 51 (Miss. Feb. 28, 2013), op. withdrawn, sub. op., 2013 Miss. LEXIS 308 (Miss. May 23, 2013).

Arbitration award will not be vacated except for prejudicial misconduct of arbitrators. McClendon v. Stewart, 133 Miss. 253, 97 So. 547, 1923 Miss. LEXIS 128 (Miss. 1923).

On motion to vacate award involving determination to the ownership of a note, evidence was insufficient to sustain finding that party to arbitration, a lady sixty-eight years old and weak mentally and physically, was overreached in the assignment of the note and in the arbitration award. McClendon v. Stewart, 133 Miss. 253, 97 So. 547, 1923 Miss. LEXIS 128 (Miss. 1923).

An award of arbitrators unsanctioned by the court, which was made through fraud, will not be enforced. Elledge v. Polk, 48 So. 241 (Miss. 1909).

The arbitrators must consider everything submitted to them and if they refuse to do so, the award is not binding. (This was a common-law award.) Tucker v. Gordon, 8 Miss. 306, 1843 Miss. LEXIS 90 (Miss. 1843).

3. Impeachment of award.

It is not competent to impeach an award by the testimony of an arbitrator who executed the same. Tucker v. Gordon, 8 Miss. 306, 1843 Miss. LEXIS 90 (Miss. 1843).

4. Contractual expansion of appeal rights.

Where defendant former client argued that an arbitration agreement with plaintiff law firm was unenforceable as being illusory, in that it provided for an appeal of the arbitrators' decision to the same extent that a Mississippi county court jury verdict could be appealed, and argued that under Miss. Code Ann. § 11-15-23 parties adversely affected by an arbitration decision did not enjoy the same appeal rights as an appeal of a jury verdict, because the court believed that the Mississippi Supreme Court would allow a contractual expansion of the right to appeal the arbitration award, the arbitration agreement was not unenforceable due to the expanded appeal rights. Speetjens v. Larson, 401 F. Supp. 2d 600, 2005 U.S. Dist. LEXIS 29222 (S.D. Miss. 2005).

RESEARCH REFERENCES

ALR.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award. 47 A.L.R.2d 1362.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law. 22 A.L.R.4th 366.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution Award §§ 183, 185, 186, 195- 198, 203, 204, 226.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 141 et seq.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

27 Am. Jur. Proof of Facts 3d 103, Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration.

§ 11-15-25. Correction of award.

Any party to the submission may also move the court to modify or correct the award in the following cases:

(a) Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to in such award;

(b) Where the arbitrators shall have awarded upon some matter not submitted to them, nor affecting the merits of the decision of the matter submitted;

(c) Where the award shall be imperfect in some matter of form, not affecting the merits of the controversy, and when, if it had been a verdict of a jury rendered in such court, the defect could have been amended or disregarded by the court.

HISTORY: Codes, 1892, § 107; 1906, § 108; Hemingway's 1917, § 95; 1930, § 93; 1942, § 291.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Standard by which an appellate court reviews a trial court's order confirming an arbitration award under the Federal Arbitration Act (FAA) is that questions of law are reviewed de novo and findings of fact are reviewed only for clear error; the State arbitration act presents nearly identical requirements and exceptions for review, and the supreme court embraces this standard of review to evaluate properly the application of the statutes, while reviewing the trial court's actions for error. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Only grounds for modifying an arbitration award are grounds prescribed by this section [Code 1942, § 291]. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in this section [Code 1942, § 291] and Code 1942, § 290. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Fact that installment payment notes totaled more than unpaid balance, the time purchase price of automobile, does not prove misdescription of time price of miscalculation of interest to support a motion for modification of award where excess over time price is explained by phrase, "including interest and carrying charges." Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

For a case in which a mistake in the computation of time in awarding party the price of his labor was corrected without a statute, see Robertson v. Wells, 28 Miss. 90, 1854 Miss. LEXIS 152 (Miss. 1854).

The award should be in accordance with the submission and not extend to subjects not submitted nor to strangers. Gibson v. Powell, 13 Miss. 712, 1846 Miss. LEXIS 17 (Miss. 1846).

RESEARCH REFERENCES

ALR.

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 A.L.R.3d 200.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 183, 185, 186, 195- 198, 203, 204, 226.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 131 et seq.

§ 11-15-27. Motion to vacate or modify award; when made.

An application to vacate or modify an award shall be made to the court at the term next after the making and publication of the award, upon at least five days' notice, in writing, being given to the adverse party, if there be time for that purpose; and if there be not time, such court, or the judge thereof, may, upon good cause shown, order a stay of proceedings upon the award, either absolutely or upon such terms as shall appear just, until the next succeeding term of court.

HISTORY: Codes, 1892, § 108; 1906, § 109; Hemingway's 1917, § 96; 1930, § 94; 1942, § 292.

Cross References — Causes for vacation of award, see § 11-15-23.

Modification and correction of award, see § 11-15-25.

Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137, 2013 Miss. App. LEXIS 781 (Miss. Ct. App. 2013).

Mississippi statute of limitations for actions to vacate arbitration awards (§ 11-15-27) will not be applied in action seeking to vacate arbitration award under Labor Management Relations Act (29 USCS § 1985) where action has been filed in federal court in Tennessee and Tennessee has unambiguous statute of limitations for analogous cause of action, in contrast to § 11-15-27 which is ambiguous and uncertain to point of frustration. Champion International Corp. v. United Paperworkers International Union, 779 F.2d 328, 1985 U.S. App. LEXIS 25602 (6th Cir. Tenn. 1985).

In an action brought by a truck driver under the Labor Management Relations Act to challenge an arbitration decision upholding his discharge, § 11-15-27 was properly applied even though the arbitration award had not been signed in accordance with the requirements for the signing of arbitration awards under Mississippi law, since the arbitration took place under federal law, and the only state law applicable was the statute of limitations, not state procedural requirements. Rigby v. Roadway Express, Inc., 680 F.2d 342, 1982 U.S. App. LEXIS 18320 (5th Cir. Miss. 1982).

RESEARCH REFERENCES

ALR.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Arbi-

tration and Award, Forms 141 et seq (Award; subsequent proceedings).

§ 11-15-29. Application to vacate or modify award; new hearing.

On application as provided for in Section 11-15-27, the court may vacate the award in any of the cases specified in Section 11-15-23, and if the time in which the award shall have been required to be made by the articles of submission has not expired, may, in its discretion, direct a new hearing by the arbitrators; and, in the cases specified in Section 11-15-25, the court may modify and correct the award so as to effect the intent thereof, and to promote justice between the parties.

HISTORY: Codes, 1892, § 109; 1906, § 110; Hemingway's 1917, § 97; 1930, § 95; 1942, § 293.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

It is not legitimate, in exceptions to an arbitration award, to inquire into the original merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a party challenges the evidentiary basis for a trial court's decision. Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

Nothing in an award relative to merits of controversy as submitted, however wrongfully decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in Code 1942, §§ 290 and 291. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Power of arbitrator to correct, or power of court to correct or resubmit, non-labor award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Am. Jur.

27 Am. Jur. Proof of Facts 3d 103, Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration.

§ 11-15-31. Judgments; when and how rendered.

Upon such award being confirmed or modified, the court shall render such judgment therein in favor of the party entitled to the same, as would be rendered in such case in the circuit or chancery court.

HISTORY: Codes, 1892, § 110; 1906, § 111; Hemingway's 1917, § 98; 1930, § 96; 1942, § 294.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

An award may be binding on a portion of the parties and not on all of them, as where the distributees of an estate some of whom were infants, on the one side and the administrator on the other submitted a controversy about the administration to arbitrators, the award was held to bind the adults but not the infants. Fort v. Battle, 21 Miss. 133, 1849 Miss. LEXIS 153 (Miss. 1849).

§ 11-15-33. Costs; how taxed and collected.

The costs of the proceedings, after an application to the court for its action upon the award, and the fees allowed by law to the arbitrators, where no provision for payment is made thereof in the award, shall be taxed and collected as in other suits.

HISTORY: Codes, 1892, § 111; 1906, § 112; Hemingway's 1917, § 99; 1930, § 97; 1942, § 295.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Compensation for referees, auditors, and arbitrators, see § 25-7-35.

RESEARCH REFERENCES

ALR.

Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Am. Jur.

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:177 (Present disputes).

§ 11-15-35. Pending suits may be arbitrated.

In all suits or actions in any court, it shall be lawful for the plaintiff and defendant to consent to a rule of court referring all matters in controversy between them in such suit or action to the arbitrament of any person or persons who may be mutually chosen by them; and the award of such arbitrators being made and returned according to the rule of submission of the parties, approved by the court and entered of record, shall have the same effect as the final judgment or decree of the court into which such award may be returned, and execution may issue thereon accordingly; and like proceedings may be had, where applicable, as is provided in other cases.

HISTORY: Codes, 1892, § 112; 1906, § 113; Hemingway's 1917, § 100; 1930, § 98; 1942, § 296.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Conclusiveness of award.

1. In general.

Agreement to submit controversy to arbitration has effect of compromise settlement of matters in dispute and this agreement merges original causes of action and defenses into written award and makes that the exclusive source of rights and liabilities of parties. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

But the regular guardian may so submit a controversy in which he is authorized to give an acquittance. Goleman v. Turner, 22 Miss. 118, 1850 Miss. LEXIS 109 (Miss. 1850).

A guardian ad litem cannot bind his ward by submitting the suit to arbitration. Fort v. Battle, 21 Miss. 133, 1849 Miss. LEXIS 153 (Miss. 1849).

2. Conclusiveness of award.

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in Code 1942, §§ 290 and 291. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Unless arbitrators are restricted by agreement of submission, they are final judges of both law and fact and an award will not be reviewed or set aside for mistake in either. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

Parties to a replevin action who have agreed to submit to arbitrator issue involving usury are bound by whatever arbitrators declare to be law between them, and award is final and conclusive. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

An award returned into the circuit court by arbitrators appointed under this section [Code 1942, § 296] should be vacated when it appears that after the submission of the case the arbitrators heard the unsworn testimony of one party, in the absence of, and without the knowledge of the other or his counsel. Rand v. Peel, 74 Miss. 305, 21 So. 10, 1896 Miss. LEXIS 140 (Miss. 1896).

On an appeal from an award returned into and approved by the circuit court, said award is dealt with by the Supreme Court in the matter of procedure as having the same effect as a final judgment of the trial court, and when set aside the submission falls with it. Rand v. Peel, 74 Miss. 305, 21 So. 10, 1896 Miss. LEXIS 140 (Miss. 1896).

The objection that the circuit court could not render judgment on an award until the end of the term next following its return, is not well taken. Where the award was returned before the term of court began and plaintiff invited action upon it by making a motion in the case, the court rightly assumed that they were prepared to urge objections which they expected to make. Hollingsworth v. Willis, 64 Miss. 152, 8 So. 170, 1886 Miss. LEXIS 32 (Miss. 1886).

Affidavits in support of a motion to set aside an award, which are referred to in the bill of exceptions but not there set out, will not be considered by the Supreme

Court, though certain affidavits which appeared to be the same are set out elsewhere in the record. Hollingsworth v. Willis, 64 Miss. 152, 8 So. 170, 1886 Miss. LEXIS 32 (Miss. 1886).

RESEARCH REFERENCES

ALR.

Laches or statute of limitations as bar to arbitration under agreement. 37 A.L.R.2d 1125.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate. 41 A.L.R.2d 872.

Validity and effect of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may be determined by arbitrator appointed by other party. 47 A.L.R.2d 1346.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding. 41 A.L.R.4th 1013.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 18- 27.

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:133-23:155, 23:172-23:176 (Present disputes).

§ 11-15-37. Construction of chapter.

This chapter shall not be construed to take away from the courts of equity their power over awards, nor to make invalid any award good at common law. It shall be liberally construed for the encouragement of the settlement of disputes and the prevention of litigation.

HISTORY: Codes, 1892, § 113; 1906, § 114; Hemingway's 1917, § 101; 1930, § 99; 1942, § 297.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see § 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Arbitration proceedings which were had on subcontractor's request, where subcontractor was in default on a contract with state building commission, were an appeal from architect's determination and were broad enough to settle a dispute between the parties even though it was found only in general terms that architect's certificate should have been issued. Horne v. State Bldg. Com., 222 Miss. 520, 76 So. 2d 356, 1954 Miss. LEXIS 675 (Miss. 1954).

Articles of agreement to arbitrate and awards thereon are to be liberally construed so as to encourage settlement of disputes and prevention of litigation, and every reasonable presumption will be indulged in favor of validity of arbitration proceedings. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948); Stout v. W. M. Garrard & Co., 128 Miss. 418, 91 So. 33, 1922 Miss. LEXIS 125 (Miss. 1922).

Agreement to submit controversy to arbitration has effect of compromise settlement of matters in dispute and this agreement merges original causes of action and defenses into written award and makes that the exclusive source of rights and liabilities of parties. Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809, 1948 Miss. LEXIS 340 (Miss. 1948).

A liberal construction of the arbitration statute was expressly provided doubtless with knowledge that ordinary articles of arbitration are prepared by parties having no knowledge of technical rules, and refinements ought not to be ingrafted by the courts upon such proceedings. Stout v. W. M. Garrard & Co., 128 Miss. 418, 91 So. 33, 1922 Miss. LEXIS 125 (Miss. 1922).

Policy of the state is to permit arbitration and give effect to a valid submission and award in view of this section [Code 1942, § 297]. Scottish Union & Nat'l Ins. Co. v. Skaggs, 114 Miss. 618, 75 So. 437, 1917 Miss. LEXIS 68 (Miss. 1917).

RESEARCH REFERENCES

ALR.

Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters. 38 A.L.R.5th 69.

Am. Jur.

3 Am. Jur. Trials 681, Tactics and Strategy of Pleading §§ 50 et seq.

ARBITRATION OF CONTROVERSIES ARISING FROM CONSTRUCTION CONTRACTS AND RELATED AGREEMENTS

Sec.

11-15-101. Agreements to which arbitration provisions apply.
11-15-103. Agreements to submit controversies to arbitration; refusal of binding arbitration provisions in public contracts.
11-15-105. Application for order to proceed with arbitration; stay; determination of issues.
11-15-107. Initiation of arbitration.
11-15-109. Appointment of arbitrators.
11-15-111. Powers of arbitrators to be exercised by majority.
11-15-113. Time, place and notice of hearing; procedure for conduct of hearing.
11-15-115. Representation by attorney at proceedings.
11-15-117. Subpoenas for production of evidence and attendance of witnesses; other discovery.
11-15-119. Nature of remedy; form and time of award.
11-15-121. Fees and expenses.
11-15-123. Modification or correction of award by arbitrators.
11-15-125. Confirmation of award by court.
11-15-127. Form and service of application and notice.
11-15-129. Jurisdiction of circuit courts over arbitration.
11-15-131. Venue of arbitration applications.
11-15-133. Vacating arbitration award.
11-15-135. Application for modification or correction of award; grounds; joinder with application for vacating award.
11-15-137. Order and judgment on award; enforcement; costs.
11-15-139. Preparation of judgment roll; docketing judgment or decree.
11-15-141. Court actions from which appeal may be taken.
11-15-143. Inapplicability of other arbitration provisions.

§ 11-15-101. Agreements to which arbitration provisions apply.

(1) Sections 11-15-101 through 11-15-143 apply only to agreements and provisions for arbitration made subsequent to July 1, 1981.

(2) Sections 11-15-101 through 11-15-143 shall apply to any agreement for the planning, design, engineering, construction, erection, repair or alteration

of any building, structure, fixture, road, highway, utility or any part thereof, and to any purchase by, or supply to, any contractor or subcontractor qualified to do business in this state of any materials to be used in the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof; provided, however, that nothing contained in Sections 11-15-101 through 11-15-143 shall be construed as amending or otherwise affecting the provisions of Sections 65-2-1 through 65-2-17, Section 65-1-89, Section 65-1-91, and Section 77-9-387, Mississippi Code of 1972.

(3) Sections 11-15-101 through 11-15-143 shall also apply to any agreement for architectural, engineering, surveying, planning and related professional services performed in connection with any of the agreements enumerated in subsection (2) of this section.

(4) Sections 11-15-101 through 11-15-143 shall have no effect on the establishment or enforcement of any lien provided for in Title 85, Chapter 7, Mississippi Code of 1972.

HISTORY: Laws, 1981, ch. 495, § 1, eff from and after July 1, 1981.

Editor's Notes — Section 77-9-387 referred to in (2) was repealed by Laws of 1997, ch. 460, § 21, eff from and after July 1, 1997.

Cross References — Provisions on arbitration and award of controversies, see § 11-15-1 et seq.

Inapplicability of §§ 11-15-1 through 11-15-37 to agreements enumerated in this section, see § 11-15-143.

Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

JUDICIAL DECISIONS

1. In general.

Because the underlying dispute concerned the installation of a roof and a subcontract between two contractors, the laws under this section controlled. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117, 2005 Miss. App. LEXIS 1000 (Miss. Ct. App. 2005).

OPINIONS OF THE ATTORNEY GENERAL

The University of Mississippi Medical Center may agree to contracts which provide that disputes arising out of and concerning the performance or nonperformance of those contracts be resolved by binding arbitration. Conerly, February 5, 1999, A.G. Op. #99-0026.

RESEARCH REFERENCES

ALR.

Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Municipal corporation's power to submit to arbitration. 21 A.L.R.3d 569.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Enforcement of arbitration agreement contained in construction contract by or against nonsignatory. 100 A.L.R.5th 481.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 4- 7, 18- 27.

52 Am. Jur. Trials 209, Alternative Dispute Resolution: Construction Industry.

CJS.

6 C.J.S., Arbitration §§ 9, 10, 39–41.

Law Reviews.

An overview of Mississippi's Construction Arbitration Act, 53 Miss. L. J. 501, September, 1983.

Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

A Review of Mississippi Law Regarding Arbitration, 76 Miss. L.J. 1007, Spring, 2007.

§ 11-15-103. Agreements to submit controversies to arbitration; refusal of binding arbitration provisions in public contracts.

Two (2) or more parties referred to in Section 11-15-101 may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable and irrevocable without regard to the justiciable character of the controversy. Provided, however, that in the event either party to such an agreement initiates litigation against the other with respect to such agreement, such arbitration provision shall be deemed waived unless asserted as a defense on or before the responding party is required to answer to such litigation. Whenever a provision for binding arbitration is included in the contract documents of a public contract, any bidder may refuse to accept such clause and shall so state on the bid document before entering into such public contract, and such refusal shall not be cause to reject any bid on, or refuse the award of such public contract.

HISTORY: Laws, 1981, ch. 495, § 2, eff from and after July 1, 1981.

Cross References — Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Arbitration provision held enforceable.

1. In general.

The statute does not provide the exclusive method by which a party may effectuate a waiver of a right to arbitration. Scott Addison Constr. v. Lauderdale County Sch. Sys., 789 So. 2d 771, 2001 Miss. LEXIS 98 (Miss. 2001).

Parties to a construction agreement, as a matter of right to contract, may in advance bind themselves to compulsory arbitration of disputes that arise between them. Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

2. Arbitration provision held enforceable.

Arbitration clause of a contractor and developer's contract that excluded aesthetic-effect claims from arbitration was enforceable, but the trial court erred by listing certain punch-list items as aesthetic and thus not subject to arbitration because it failed to define the ambiguous term "aesthetic" and what it covered, and provided no reasoning for its selections. Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc., 107 So. 3d 943, 2013 Miss. LEXIS 29 (Miss. 2013).

Arbitration provision in a contract between a developer and a contractor was unambiguous, and its failure to provide an express jury trial waiver did not render it unenforceable, as the developer was a sophisticated business that should have been aware of the consequences of the arbitration agreement which it negotiated. Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc., 107 So. 3d 943, 2013 Miss. LEXIS 29 (Miss. 2013).

OPINIONS OF THE ATTORNEY GENERAL

The University of Mississippi Medical Center may agree to contracts which provide that disputes arising out of and concerning the performance or nonperformance of those contracts be resolved by binding arbitration. Conerly, February 5, 1999, A.G. Op. #99-0026.

RESEARCH REFERENCES

ALR.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate. 41 A.L.R.2d 872.

Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Arbitration of disputes within close corporation. 64 A.L.R.2d 643.

Application of provisions of arbitration statutes excluding contracts for labor or services. 64 A.L.R.2d 1336.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 A.L.R.3d 1008.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

Validity and enforceability of provision for binding arbitration and waiver thereof. 24 A.L.R.3d 1325.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein. 32 A.L.R.3d 377.

Statute of limitations as bar to arbitration under agreement. 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services. 95 A.L.R.3d 1145.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 28- 76.

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:146 (present disputes-filing agreement for arbitration with clerk of appropriate court).

CJS.

6 C.J.S., Arbitration §§ 14, 15–18, 40–48 et seq.

§ 11-15-105. Application for order to proceed with arbitration; stay; determination of issues.

(1) Any party to an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 claiming the neglect or refusal of another party thereto to comply therewith may make application to the court as described in Sections 11-15-133 and 11-15-135 for an order directing the parties to proceed with arbitration in accordance with the terms of such agreement or provision. If the court finds that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine such issue and shall, consistent with such determination, grant or deny the application.

(2) Any action or proceeding involving an issue subject to arbitration under Sections 11-15-101 through 11-15-143 shall be stayed if an order for arbitration or an application therefor has been made under this section. If such issue is severable, the stay may be with respect to such issue only. An order for arbitration shall include the stay.

(3) On application, the court may stay an arbitration proceeding commenced or threatened if it shall find no agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the making of the agreement or provision and shall, consistent with such determination, grant or deny the application.

(4) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

HISTORY: Laws, 1981, ch. 495, § 3, eff from and after July 1, 1981.

Cross References — Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

JUDICIAL DECISIONS

ANALYSIS

1. In relation to limitations periods.
2. Arbitration provision held enforceable.

1. In relation to limitations periods. Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117, 2005 Miss. App. LEXIS 1000 (Miss. Ct. App. 2005).

2. Arbitration provision held enforceable. Arbitration clause of a contractor and developer's contract that excluded aesthetic-effect claims from arbitration was enforceable, but the trial court erred by listing certain punch-list items as aesthetic and thus not subject to arbitration because it failed to define the ambiguous term "aesthetic" and what it covered, and provided no reasoning for its selections. Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc., 107 So. 3d 943, 2013 Miss. LEXIS 29 (Miss. 2013).

Arbitration provision in a contract between a developer and a contractor was unambiguous, and its failure to provide an express jury trial waiver did not render it unenforceable, as the developer was a sophisticated business that should have been aware of the consequences of the arbitration agreement which it negotiated. Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc., 107 So. 3d 943, 2013 Miss. LEXIS 29 (Miss. 2013).

RESEARCH REFERENCES

ALR.

Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 28- 76.

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:146 (present disputes-filing agreement for arbitration with clerk of appropriate court).

CJS.

6 C.J.S., Arbitration §§ 122, 128, 174, 175.

§ 11-15-107. Initiation of arbitration.

If an agreement or provision for arbitration provides a method for the initiation of arbitration, such method shall be followed. In the absence thereof, the party desiring to initiate the arbitration shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought. A party upon whom the demand for arbitration is made may file an answering statement to the other party within twenty (20) days after receipt of the initial demand. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

HISTORY: Laws, 1981, ch. 495, § 4, eff from and after July 1, 1981.

Cross References — Provision regarding form of applications and notices, see § 11-15-127.

JUDICIAL DECISIONS

1. In relation to limitations periods.

Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117, 2005 Miss. App. LEXIS 1000 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR.

Delay in asserting contractual right to arbitration as precluding enforcement thereof. 25 A.L.R.3d 1171.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Am. Jur.

7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 12.1 (Answer – Defense – Laches).

CJS.

6 C.J.S., Arbitration §§ 99 et seq.

§ 11-15-109. Appointment of arbitrators.

If an agreement or provision for arbitration provides a method for the appointment of arbitrators this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or if an arbitrator who has been appointed fails or is unable to act and his successor has not been duly appointed, the court, on application of a party to such agreement or provision, shall appoint one or more arbitrators. An arbitrator so appointed shall have the same powers as if he had been named or provided for in the agreement or provision.

HISTORY: Laws, 1981, ch. 495, § 5, eff from and after July 1, 1981.

Cross References — Criminal penalty for arbitrator taking bribe, see § 97-9-5.

RESEARCH REFERENCES

ALR.

Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement. 75 A.L.R.5th 595.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 102- 135.

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:223 et seq. (Appointment of arbitrator).

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS.
6 C.J.S., Arbitration §§ 168-192.

§ 11-15-111. Powers of arbitrators to be exercised by majority.

The powers of the arbitrators may be exercised by a majority of their number unless otherwise provided in the agreement or provision for arbitration.

HISTORY: Laws, 1981, ch. 495, § 6, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. In general.
When a mortgagee brings an action for a deficiency judgment on mortgaged property that the mortgagee purchased at a foreclosure sale in which the mortgagee was the only bidder, subsequent valuations of the property and the totality of the actions taken by the creditor/purchaser at the foreclosure sale to satisfy the full debt from the property foreclosed becomes relevant to the entitlement of the mortgagee to a deficiency judgment, and therefore should be admissible. Federal Land Bank v. Wolfe, 560 So. 2d 137, 1989 Miss. LEXIS 500 (Miss. 1989).

RESEARCH REFERENCES

ALR.
Modern status of rules respecting concurrence of all arbitrators as condition of binding award under private agreement not specifying unanimity. 83 A.L.R.3d 996.

Am. Jur.
4 Am. Jur. 2d, Alternative Dispute Resolution §§ 121- 131.

CJS.
6 C.J.S., Arbitration § 190.

§ 11-15-113. Time, place and notice of hearing; procedure for conduct of hearing.

Unless otherwise provided by the agreement or provision for arbitration:

(a) The arbitrators so appointed shall set a time and place for the hearing and cause notification to the parties to be served personally in any manner provided for by law or by registered or certified mail not less than twenty (20) days before the hearing. Appearance at the hearing waives a party's right to such notice. The arbitrators may adjourn their hearing from time to time upon their own motion and shall do so upon the request of any party to the arbitration for good cause shown; provided that no adjournment or postponement of the hearing shall extend beyond the date fixed in the agreement or provision for making the award unless the parties consent to a later date.

(b) A hearing shall be opened by the recording of the place, time and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for a statement clarifying the issues involved.

The complaining party shall then present its claim, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs and witnesses, who shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Any party shall be entitled to cross-examine the witnesses of any other party appearing at the hearing. Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

(c) The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrators shall be the judge of the admissibility of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived his or her right to be present.

(d) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

HISTORY: Laws, 1981, ch. 495, § 7, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution Award §§ 136- 158, 162- 166, 170—172, 206.

CJS.

6 C.J.S., Arbitration §§ 167–171, 173–181.

§ 11-15-115. Representation by attorney at proceedings.

A party has the right to be represented by an attorney at any proceeding or hearing under Sections 11-15-101 through 11-15-143. A waiver thereof prior to the proceeding or hearing shall be ineffective.

HISTORY: Laws, 1981, ch. 495, § 8, eff from and after July 1, 1981.

§ 11-15-117. Subpoenas for production of evidence and attendance of witnesses; other discovery.

(1) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party to the arbitration or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(2) On application of a party to the arbitration, the arbitrators, in the manner and upon terms designated by the arbitrators, may permit a deposition to be taken of any person.

(3) Any prehearing discovery other than that referred to above shall only be permissible if agreed to by the parties involved in the arbitration.

(4) All provisions of law compelling a person under subpoena to testify are applicable.

(5) Fees for attendance as a witness shall be the same as for a witness in circuit court.

HISTORY: Laws, 1981, ch. 495, § 9, eff from and after July 1, 1981.

Cross References — Issuance and service of subpoenas duces tecum, generally, see § 11-1-51.

Subpoenas for witnesses, generally, see § 13-3-93 et seq.

Fees for witness in circuit court, see § 25-7-47.

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution § 134.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 61 (Petition or application by arbitrators for order compelling witness to attend arbitration proceeding).

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 62 (Order to show cause why witness should not testify before arbitrators or be punished for contempt).

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 63 (Order directing witness to appear before arbitrators to testify).

CJS.

6 C.J.S., Arbitration §§ 183–189.

98 C.J.S., Witnesses §§ 201-229.

§ 11-15-119. Nature of remedy; form and time of award.

(1) The arbitrators may grant any remedy or relief which is just, equitable and consistent with the agreement of the parties which is the subject of the arbitration.

(2) The award shall be in writing and shall be signed by the arbitrator joining in the award. The arbitrators shall deliver a copy to each party to the arbitration either personally or by registered or certified mail, or as provided in the agreement or provision.

(3) An award shall be made within the time fixed therefor by the

agreement or provision for arbitration or, if not so fixed, within such time as the court may order on application of a party to the arbitration. The parties may, by written agreement, extend the time before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

(4) An arbitrator may award attorney's fees and costs to a prevailing party.

HISTORY: Laws, 1981, ch. 495, § 10; Laws, 1994, ch. 626, § 8, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR.

Necessity that arbitrators, make specific or detailed findings of fact or conclusions of law. 82 A.L.R.2d 969.

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 A.L.R.3d 200.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made. 56 A.L.R.3d 633.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Arbitrator's power to award punitive damages. 83 A.L.R.3d 1037.

Equipment leasing expense as element of construction contractor's damages. 52 A.L.R.4th 712.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution §§ 150 et seq.

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:133-23:155, 23:172-23:176 (Present disputes).

CJS.

6 C.J.S., Arbitration §§ 192-258.

§ 11-15-121. Fees and expenses.

Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' reasonable expenses and fees, together with other reasonable expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award. Such compensation shall be taxed and collected as costs in the suit.

HISTORY: Laws, 1981, ch. 495, § 11, eff from and after July 1, 1981.

Cross References — Compensation for arbitrators, see § 25-7-35.

RESEARCH REFERENCES

ALR.

Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

§ 11-15-123. Modification or correction of award by arbitrators.

Upon request by a party to the arbitration, mailed by registered or certified mail to the arbitrators and opposing party(s) within twenty (20) days of the receipt of the award, to modify or correct the award on any or all of the grounds enumerated in Section 11-15-135, the arbitrators shall, within ten (10) days, modify, correct or affirm the award as they find proper.

HISTORY: Laws, 1981, ch. 495, § 12, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. Waiver.

City waived its argument that the arbitrator erred by denying as untimely its motion for reconsideration because the city never presented the issue to the circuit judge for decision; the city never asked the circuit judge to vacate the arbitration award or grant any other relief based on the arbitrator's refusal to reconsider issues related to damages City of Hattiesburg v. Precision Constr., 192 So. 3d 1089, 2016 Miss. App. LEXIS 312 (Miss. Ct. App. 2016).

RESEARCH REFERENCES

ALR.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 A.L.R.3d 200.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution § 130, 151, 159, 160, 187, 210.

CJS.

6 C.J.S., Arbitration §§ 172, 244.

§ 11-15-125. Confirmation of award by court.

Upon application by a party to the arbitration filed within ninety (90) days of the receipt of the later of a copy of the award issued pursuant to Section 11-15-119, or a modified or corrected award as provided by Section 11-15-123 the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in Sections 11-15-133 and 11-15-135.

HISTORY: Laws, 1981, ch. 495, § 13, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. Award confirmed.

According to Miss. Code Ann. § 11-15-125 and Miss. Code Ann. § 11-15-135, an arbitration award would be confirmed absent the existence of at least one of the grounds listed for vacating, modifying, or correcting an award; because the subcontractor did not assert any of these grounds in its response asserting that the motion to confirm was premature, its motion to set aside judgment, motion to vacate, or motion to reconsider, the circuit court properly confirmed the award in favor of the general contractor. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80, 2006 Miss. LEXIS 61 (Miss. 2006).

RESEARCH REFERENCES

Am. Jur.
4 Am. Jur. 2d, Alternative Dispute Resolution §§ 169, 170.

CJS.
6 C.J.S., Arbitration §§ 245–253.

§ 11-15-127. Form and service of application and notice.

Except as otherwise provided, an application to the court under Sections 11-15-101 through 11-15-143 shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

HISTORY: Laws, 1981, ch. 495, § 14, eff from and after July 1, 1981.

§ 11-15-129. Jurisdiction of circuit courts over arbitration.

The term "court" as used in Sections 11-15-101 through 11-15-143 means the circuit court of the county as provided in Section 11-15-131. The making of an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 and providing for arbitration in this state shall, whether made within or outside this state, confer jurisdiction on the court to enforce the agreement or provision under Sections 11-15-101 through 11-15-143 and to enter judgment on an award duly rendered in an arbitration thereunder and to vacate, modify or correct an award rendered thereunder for such cause and in the manner provided in Sections 11-15-101 through 11-15-143.

HISTORY: Laws, 1981, ch. 495, § 15, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR.
Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

§ 11-15-131. Venue of arbitration applications.

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

HISTORY: Laws, 1981, ch. 495, § 16, eff from and after July 1, 1981.

§ 11-15-133. Vacating arbitration award.

(1) Upon application of a party, the court shall vacate an award where:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is no ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within ninety (90) days after receipt of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(3) In vacating the award on such grounds, the court may order a rehearing before new arbitrators chosen as provided in the agreement or provision for arbitration or, in the absence thereof, by the court in accordance with Section 11-15-107. The time within which the agreement or provision for arbitration requires the award to be made is applicable to the rehearing and commences from the date of the order.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

HISTORY: Laws, 1981, ch. 495, § 17, eff from and after July 1, 1981.

Cross References — Jurisdiction of circuit courts, generally, see § 9-7-81 et seq.

Applicability of procedure in this section to one seeking order directing parties to proceed to arbitration, see § 11-15-105.

Criminal penalty for arbitrator taking bribe, see § 97-9-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Request to vacate properly denied.

1. In general.

Courts requested to confirm, modify and/or vacate arbitration awards are not at liberty to permit the examination of witnesses; witness testimony outside the confines of the arbitration record amounts to fact finding by the trial court, exceeding the scope of the court's review. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Standard by which an appellate court reviews a trial court's order confirming an arbitration award under the Federal Arbitration Act (FAA) is that questions of law are reviewed de novo and findings of fact are reviewed only for clear error; the State arbitration act presents nearly identical requirements and exceptions for review, and the supreme court embraces this standard of review to evaluate properly the application of the statutes, while reviewing the trial court's actions for error. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Much like the Federal Arbitration Act, the Mississippi construction arbitration statutes significantly limit the grounds for vacation and modification; courts adhering to these rules have no need to hear witness testimony to determine whether an award should be modified or withdrawn. Rather, courts make these decisions based on the evident nature, the clear and obvious presence, of the error in the award. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

According to Miss. Code Ann. Section 11-15-133(2), even a party challenging an award predicated upon fraud, corruption, or other undue means, had only ninety days to do so, starting from the date the fraud, corruption, or other undue means was known or should have been known; it was easy to envision the negative effects the subcontractor's interpretation of the statute could have on the benefits of arbitration, if a trial court must wait ninety days, in every case, before confirming the award. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80, 2006 Miss. LEXIS 61 (Miss. 2006).

It is not legitimate, in exceptions to an arbitration award, to inquire into the original merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a party challenges the evidentiary basis for a trial court's decision. Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

Section 11-15-133, which authorizes an inquiry into "evident partiality," precludes consideration of whether the relief granted by the arbitrator is such that it could have been granted by a court of law or equity. Evident partiality of an arbitrator as a defense of an award is analogous to an attack upon a judge on the grounds of partiality. On appeal, evident partiality may not be shown by an inquiry into the merits. Moreover, the mere appearance of bias that might disqualify a judge will not disqualify an arbitrator. To vacate an award on the grounds of evident partiality, a reviewing court must find some personal interest on the part of the arbitrator. Personal bias of an arbitrator cannot be shown by means other than pecuniary interest or some other actual relationship between the parties. Moreover, an arbitrator's general interest in his or her industry is insufficient grounds for vacating an award. The partiality "must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 1990 Miss. LEXIS 155 (Miss. 1990).

Evident partiality of an arbitrator as a defense to an award is analogous to attacks upon a judge on grounds of partiality. Evident partiality has objective and subjective components. It contemplates an objective view of an arbitrator's state of mind, that which would sway the judgment and be reasonably likely to render him or her unable to proceed impartially in a particular case. The statutory language also refers to a subjective mental attitude, a preconceived opinion, or a predisposition toward a party to the arbitration. Craig v. Barber, 524 So. 2d 974, 1988 Miss. LEXIS 214 (Miss. 1988).

2. Request to vacate properly denied.

Denial of a contractor's motion to vacate an arbitration award for a builder under Miss. Code Ann. § 11-15-133(1) was proper as: (1) the arbitrator properly refused to postpone the arbitration hearing after the contractor obtained new counsel because the contractor had already caused substantial delay in the proceedings; (2) three separate scheduling hearings were held prior to arbitration due to the contractor's failure to cooperate: (3) obtaining new counsel merely five days before arbitration was scheduled was yet another effort by the contractor to further delay the proceedings; and (4) the arbitrator was well within his authority to exclude the documentary evidence due to the contractor's failure to present the evidence in a timely manner. Tri County Contrs., Inc. v. Better Quality Builders, LLC, 111 So. 3d 1285, 2013 Miss. App. LEXIS 228 (Miss. Ct. App. 2013).

RESEARCH REFERENCES

ALR.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of arbitration award. 47 A.L.R.2d 1362.

Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Setting aside arbitration award on ground of interest or bias of arbitrators–commercial, business, or real estate transactions. 67 A.L.R.5th 179.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution § 183.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

§ 11-15-135. Application for modification or correction of award; grounds; joinder with application for vacating award.

(1) Upon application made by a party to the arbitration within ninety (90) days after receipt of a copy of the award, the court shall modify or correct the award where:

(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If such application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected; otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

HISTORY: Laws, 1981, ch. 495, § 18, eff from and after July 1, 1981.

Cross References — Applicability of procedure in this section to one seeking order directing parties to proceed to arbitration, see § 11-15-105.

Criminal penalty for arbitrator taking bribe, see § 97-9-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Modification denied.

1. In general.

Trial court exceeded its jurisdiction because it assumed the role of factfinder and reviewed witness testimony outside the arbitration record to determine where and to what extent a miscalculation existed; the arbitrator clearly defined the retainage amounts and subtracted them from the overall award as monies unpaid yet remaining under dispute, and the evident nature of an award's calculation error would have been enough for the trial court to make its decision. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Courts requested to confirm, modify and/or vacate arbitration awards are not at liberty to permit the examination of witnesses; witness testimony outside the confines of the arbitration record amounts to fact finding by the trial court, exceeding the scope of the court's review. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Standard by which an appellate court reviews a trial court's order confirming an arbitration award under the Federal Arbitration Act (FAA) is that questions of law are reviewed de novo and findings of fact are reviewed only for clear error; the State arbitration act presents nearly identical requirements and exceptions for review, and the supreme court embraces this standard of review to evaluate properly the application of the statutes, while reviewing the trial court's actions for error. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Supreme court recognizes arbitration as a binding, bargained-for, dispute-resolution method, and those matters arbitrated should not be retried by the courts of the State, and accordingly, arbitration awards are considered final, with very few, narrow exceptions outlined by statute; the "evident" (plain, obvious, or clearly understood) miscalculation must be apparent from nothing more than the four corners of the award and the contents of the arbitration record. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Much like the Federal Arbitration Act, the Mississippi construction arbitration statutes significantly limit the grounds for vacation and modification; courts adhering to these rules have no need to hear witness testimony to determine whether an award should be modified or withdrawn. Rather, courts make these decisions based on the evident nature, the clear and obvious presence, of the error in the award. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

Modification of an arbitration award may be had only where the purported mistake is the product of an evident numerical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award, where the award could be corrected without the merits being affected, or where the award is imperfect in a matter of form that does not affect the merits. D'Angelo v. Hometown Concepts, Inc., 791 So. 2d 270, 2001 Miss. App. LEXIS 107 (Miss. Ct. App. 2001).

2. Modification denied.

Circuit court did not err in denying a city's motion to modify an arbitration award because the city failed to establish an evident miscalculation of figures; because there was no record of the hearing, it was impossible to say that the arbitrator made an "evident miscalculation," and the arbitrator's decision cited testimony concerning the contractor's lost profits. City of Hattiesburg v. Precision Constr., 192 So. 3d 1089, 2016 Miss. App. LEXIS 312 (Miss. Ct. App. 2016).

According to Miss. Code Ann. § 11-15-125 and Miss. Code Ann. § 11-15-135, an arbitration award would be confirmed absent the existence of at least one of the grounds listed for vacating, modifying, or correcting an award; because the subcontractor did not assert any of these grounds in its response asserting that the motion to confirm was premature, its motion to set aside judgment, motion to vacate, or motion to reconsider, the circuit court properly confirmed the award in favor of the general contractor. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80, 2006 Miss. LEXIS 61 (Miss. 2006).

Modification of an arbitration award was not appropriate as the amount of damages the arbitrator awarded was not the product of an evident miscalculation of figures, but, rather, the amount was simply based upon the lowest repair estimate submitted by the appellants; the amount of damages to which the appellants were entitled was a contested issue of fact, and any judicial correction of the damage award would improperly affect the merits. D'Angelo v. Hometown Concepts, Inc., 791 So. 2d 270, 2001 Miss. App. LEXIS 107 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR.

Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution § 183.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS.

6 C.J.S., Arbitration §§ 197-235.

§ 11-15-137. Order and judgment on award; enforcement; costs.

Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered and be enforced as any other judgment or decree. Costs may be awarded by the court.

HISTORY: Laws, 1981, ch. 495, § 19, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. Attorneys' fees and costs.

Subcontractor was not entitled to attorney's fees and costs because the supreme court recognized the agreement between the subcontract and the contractor, which held them responsible for their individual costs and fees and dividing the costs of appeal accordingly. D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So. 3d 92, 2018 Miss. LEXIS 202 (Miss. 2018).

RESEARCH REFERENCES

ALR.

Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Am. Jur.

4 Am. Jur. 2d, Alternative Dispute Resolution § 181.

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2A Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:133-23:155, 23:172-23:176 (Present disputes).

§ 11-15-139. Preparation of judgment roll; docketing judgment or decree.

(1) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(a) The agreement or provision for arbitration and each written extension of the time within which to make the award;

(b) The award;

(c) A copy of the order confirming, modifying or correcting the award; and

(d) A copy of the judgment or decree.

(2) The judgment or decree shall be docketed as if rendered in a civil action.

HISTORY: Laws, 1981, ch. 495, § 20, eff from and after July 1, 1981.

Cross References — Circuit court dockets, generally, see § 9-7-171 et seq.

§ 11-15-141. Court actions from which appeal may be taken.

(1) An appeal from the court may be taken from:

(a) An order denying the application to compel arbitration made under Section 11-15-105;

(b) An order granting an application to stay arbitration made under Section 11-15-105;

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award;

(e) An order vacating an award without directing a rehearing; or

(f) A judgment or decree entered pursuant to the provisions of Sections 11-15-101 through 11-15-143.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

HISTORY: Laws, 1981, ch. 495, § 21, eff from and after July 1, 1981.

Cross References — Appeals generally, see § 11-51-3 et seq.

RESEARCH REFERENCES

ALR.

Appealability of judgment confirming or setting aside arbitration award. 7 A.L.R.3d 608.

§ 11-15-143. Inapplicability of other arbitration provisions.

Sections 11-15-1, 11-15-3, 11-15-5, 11-15-7, 11-15-9, 11-15-11, 11-15-13, 11-15-15, 11-15-17, 11-15-19, 11-15-21, 11-15-23, 11-15-25, 11-15-27, 11-15-29, 11-15-31, 11-15-33, 11-15-35 and 11-15-37, Mississippi Code of 1972, which provide for the submission for determination of disputed matter to arbitrators selected by law or agreement, shall not be applicable to those agreements enumerated in Section 11-15-101.

HISTORY: Laws, 1981, ch. 495, § 22, eff from and after July 1, 1981.

CHAPTER 17.

SUITS TO CONFIRM TITLE OR INTEREST AND TO REMOVE CLOUDS ON TITLE

Sec.
11-17-1. Proceedings to confirm tax title.
11-17-3. Confirmation of state land patents.
11-17-5. Confirmation of state land patents; duty of attorney general.
11-17-7. Confirmation of state land patents; powers of court.
11-17-9. Confirmation of state land patents; decree; effect of fraud and failure to pay purchase price.
11-17-11. Confirmation of state land patents; appeals.
11-17-13. Confirmation of state land patents; res judicata.
11-17-15. Confirmation of state land patents; duty of district attorney and county attorney.
11-17-17. Confirmation of state land patents; construction of Sections 11-17-3 through 11-17-17.
11-17-19. Confirmation of title or interests granted by political subdivision.
11-17-21. Proceedings in suit for confirmation of title granted by political subdivision; defaults.
11-17-23. Confirmation of title or interest granted by political subdivision; decree; res judicata.
11-17-25. Confirmation of title or interest granted by political subdivision; appeals.
11-17-27. Confirmation of title or interest granted by political subdivision; applicability of Sections 11-17-19 through 11-17-27.
11-17-29. Any other title may be confirmed.
11-17-31. Removing clouds upon titles.
11-17-33. Receiver appointed for nonresident or unknown owners of mineral interests.
11-17-34. Disposition of mineral lease proceeds held by receiver.
11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.
11-17-37. Decrees as to possession, rents, etc.

§ 11-17-1. Proceedings to confirm tax title.

Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes, when the period of redemption has expired, may proceed by sworn complaint in the chancery court to have such title confirmed and quieted, and shall set forth in his complaint his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to plaintiff, or as he can ascertain by diligent inquiry. Where the names of persons in interest or their places of residence are unknown and have not been ascertained by diligent inquiry, the complaint shall so state. Where the name and places of residence of persons in interest are given they shall be made parties defendant. Where the complaint shall show that the persons interested are unknown to plaintiff and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: "To all persons having or claiming any interest in the following described land, sold for taxes on (inserting date of sale), viz: (Describing land as described in the tax collector's conveyance)." The notice shall state the nature of the suit and it shall be published in accordance with the requirements of the Mississippi Rules of Civil Procedure. It shall be lawful in all cases to set forth in the complaint the names of all persons interested, as far as ascertained, and make them parties and also to join and make defendants "all persons having or claiming any legal or equitable interest in" the lands described in the complaint. Such suits shall be proceeded with as other cases; and if the complaints be taken for confessed, or if it appear that plaintiff is entitled to a judgment, it shall be rendered, confirming the tax title against all persons claiming to hold the land by title existing at the time of the sale for taxes. Such judgment shall vest in the plaintiff, without any conveyance by a master or commissioner, a good and sufficient title to said land; and such judgment shall, in all courts of this state, be held as conclusive evidence that the title to said land was vested in the plaintiff, as against all persons claiming the same under the title existing prior to the sale for taxes.

HISTORY: Codes, 1871, § 1753; 1880, § 578; 1892, § 498; 1906, § 548; Hemingway's 1917, § 305; Laws, 1924, ch. 151; 1930, § 402; 1942, § 1314; Laws, 1991, ch. 573, § 32, eff from and after July 1, 1991.

Cross References — The constitutional jurisdiction of the Chancery Court to decree title and possession of real property, see Miss. Const. Art. 6, § 160.

Action of unlawful detainer by purchaser of land at tax sale, see § 11-25-3.

Limitation of actions concerning title to land, see §§ 15-1-7, 15-1-9, 15-1-15, 15-1-17.

Records of tax titles, see §§ 27-41-81, 27-41-83.

Map of public trust tidelands; boundary challenges, see § 29-15-7.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Validity.
2. Construction and application generally.
3. Right to maintain suit to confirm title.
4. —Title in complainant.
5. —Void or defective title.
6. Defenses.
7. Proceedings in general.
8. —Pleading.
9. —Evidence.
10. —Parties.
11. —Decree.

1. Validity.

The statute is constitutional. Belcher v. MHOON, 47 Miss. 613, 1873 Miss. LEXIS 11 (Miss. 1873).

2. Construction and application generally.

Where in a suit to confirm a tax sale, this section [Code 1942, § 1314] and Code 1942, § 1323, as to special process, had not been complied with, and although it was charged that one of the defendants was residing in the state of Georgia, the bill failed to charge that she was a nonresident of Mississippi, and neither the owner of title at the time of the tax sale, if living, nor his heirs, if he was dead, were made parties, the confirmation decree rendered therein was void. White v. Merchants & Planters Bank, 229 Miss. 35, 90 So. 2d 11, 1956 Miss. LEXIS 583 (Miss. 1956).

The purpose of this statute [Code 1942, § 1314] providing for confirmation of a tax title is that by such a proceeding any further litigation between the same parties, or their successors in title, as to the validity of the tax title, shall be precluded. Hatten v. Jones, 218 Miss. 326, 67 So. 2d 363, 1953 Miss. LEXIS 546 (Miss. 1953).

Where a chancellor committed an error of law in holding that the bill of complaint and exhibits for a decree of confirmation of tax titles were sufficient to warrant a decree of confirmation, but since he had jurisdiction of the subject matter and of the party he had jurisdiction to commit error, and since his decree was not void on its face the same is not subject to a collateral attack seeking to cancel tax claims as clouds upon titles. Hatten v. Jones, 218 Miss. 326, 67 So. 2d 363, 1953 Miss. LEXIS 546 (Miss. 1953).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to railroad right of way and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove clouds on title rather than suit to quiet and confirm title. Jones v. New Orleans & N. R. Co., 214 Miss. 804, 59 So. 2d 541, 1952 Miss. LEXIS 522 (Miss. 1952).

Purpose of suit to confirm tax title is not only to settle contentions between main parties but is to make tax title good against world, so that there may be no further litigation concerning validity of tax title. Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32, 1936 Miss. LEXIS 94 (Miss. 1936).

Statute authorizing proceeding to confirm tax title, and requiring names of all persons interested in land, so far as known, to be set forth in bill, must be strictly complied with. Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32, 1936 Miss. LEXIS 94 (Miss. 1936).

This section [Code 1942, § 1314] has no application to a suit to recover money paid at a void tax sale. Moores v. Flurry, 87 Miss. 707, 40 So. 226, 1905 Miss. LEXIS 190 (Miss. 1905).

The section [Code 1942, § 1314] applies to every variety and species of tax title. Chrisman v. Currie, 60 Miss. 858, 1883 Miss. LEXIS 25 (Miss. 1883); Metcalfe v. Perry, 66 Miss. 68, 5 So. 232, 1888 Miss. LEXIS 62 (Miss. 1888).

The statute authorizing a rehearing by defendants brought in by publication only, applies to a decree confirming tax titles. Belcher v. Wilkerson, 54 Miss. 677, 1877 Miss. LEXIS 78 (Miss. 1877).

The statute embraces levee tax titles, however acquired. Belcher v. MHOON, 47 Miss. 613, 1873 Miss. LEXIS 11 (Miss. 1873); Beirne v. Burdett, 52 Miss. 795, 1876 Miss. LEXIS 295 (Miss. 1876).

3. Right to maintain suit to confirm title.

4. —Title in complainant.

One seeking to confirm a tax title must recover, if at all, on the validity of his own title. Gregory v. Brogan, 74 Miss. 694, 76 Miss. 694, 21 So. 521, 1897 Miss. LEXIS 43 (Miss. 1897); Davis v. Cass, 72 Miss. 985, 18 So. 454, 1895 Miss. LEXIS 59 (Miss. 1895).

Under this section [Code 1942, § 1314] a complainant must show either a legal or an equitable title to the land described in the bill of complaint before the court will entertain the bill or grant the relief therein prayed for. Reliance Inv. Co. v. Johnson, 188 Miss. 227, 193 So. 630, 1940 Miss. LEXIS 12 (Miss. 1940).

Plaintiff must prove title to land in himself. Paepcke-Leicht Lumber Co. v. Savage, 137 Miss. 11, 101 So. 709, 1924 Miss. LEXIS 196 (Miss. 1924).

In suit to confirm title plaintiff must plead and prove perfect title. Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619, 1917 Miss. LEXIS 146 (Miss. 1917).

Complainant must show title in himself. Peterson v. Kittredge, 65 Miss. 33, 3 So. 65, 1887 Miss. LEXIS 10 (Miss. 1887).

5. —Void or defective title.

Where the owner of land applied in good faith to the tax collector for the purpose of ascertaining the amount of taxes and paying the same, and was prevented from making payment by the error or mistake of the collector, the attempt to pay was the equivalent of payment, and the subsequent sale of the land in question for nonpayment of taxes was void, and the purchaser at the sale acquired no title which would support a decree of confirmation. Williams v. Scott, 251 Miss. 533, 170 So. 2d 621, 1965 Miss. LEXIS 880 (Miss. 1965).

Purchasers were entitled to a return of their deposit made in connection with their contract to purchase land in view of the delay of the sellers in procuring a supposed marketable title and because, in view of this section [Code 1942, § 1314] and Code 1942, § 1391, certain rights of appeal remained in regard to the necessary confirmation of tax title to the property which could still affect the validity thereto. Hyde v. Berggren, 249 Miss. 860, 164 So. 2d 454, 1964 Miss. LEXIS 441 (Miss. 1964).

Where defendants were in adverse possession of land but before they acquired title, the tax title of both city and state ripened, and where a suit to confirm title was commenced within ten years after the city parted with its title, defendants could not and did not acquire title by adverse possession. Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477, 1955 Miss. LEXIS 399 (Miss. 1955).

Deed of purchaser at tax sale for unpaid taxes was not sustained, in suit to quiet title, where owner introduced into evidence duplicate receipt, issued pursuant to Hemingway's Code, 1927, § 8241, showing owner paid taxes and where owner orally testified that he paid the taxes and such testimony was uncontradicted. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950).

Any ambiguity in description of the land in the assessment or tax deed does not render the tax proceeding void, but is curable by parol. Martin v. Smith, 140 Miss. 168, 105 So. 494, 1925 Miss. LEXIS 246 (Miss. 1925).

A tax title, where the sale is based upon a roll not returned at the time required by law and the description is void for uncertainty, will not be confirmed. Pearce v. Perkins, 70 Miss. 276, 12 So. 205, 1892 Miss. LEXIS 103 (Miss. 1892).

6. Defenses.

Delay did not estop true owner from asserting title against purchaser at invalid tax sale where tax purchaser made no improvements or any expenditures or otherwise changed his position, except for payment of taxes subsequent to sale, which amount was offset by sums received as cash consideration for oil and gas lease and by rents paid by tenants. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950).

Defendant, whose interest in the land in question was totally extinguished by the tax sale to the state and the elapse of the period of redemption, could not set up as against the complainant the defense of fraud in the procurement of a patent to such land from the state by complainant's predecessor, since such matter could only be raised by the Land Commissioner, and accordingly, complainant was entitled to a decree confirming the title in him as against the defendant, where defendant's evidence did not disclose facts which rendered any of the deeds in the complainant's chain of title nullity. Reliance Inv. Co. v. Johnson, 188 Miss. 227, 193 So. 630, 1940 Miss. LEXIS 12 (Miss. 1940).

Defendant must have an interest in the land or his defense will not be heard. Chrisman v. Currie, 60 Miss. 858, 1883 Miss. LEXIS 25 (Miss. 1883).

7. Proceedings in general.

This statute applies only where the court rendering the decree of confirmation has jurisdiction of the subject matter and the parties and renders such a decree valid on its face, and as between the parties who are before the court by a valid service of process. Hatten v. Jones, 218 Miss. 326, 67 So. 2d 363, 1953 Miss. LEXIS 546 (Miss. 1953).

8. —Pleading.

In suit to cancel tax title, as cloud on title, affirmative relief declaring tax title to be valid could not be granted in absence of cross bill. Webb v. Anderson, 206 Miss. 398, 40 So. 2d 189, 1949 Miss. LEXIS 270 (Miss. 1949).

In deraignments of title, where confirmation of title is sought, the complainant must give the facts of his title and a mere allegation of ownership is insufficient, being simply a legal conclusion. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

It is not necessary to exhibit with a bill to confirm a tax title a certified copy of the list of sales made to the state. Campbell v. Wilson, 194 Miss. 746, 13 So. 2d 624, 1943 Miss. LEXIS 101 (Miss. 1943).

Where a certified copy of the list of tax sales to the state is not exhibited with a bill to confirm a tax title to land, it is necessary to allege in terms of fact and not by way of mere legal conclusion that every successive step essential to the validity of the tax sale-alleging the facts as to each essential step-was had and taken by the taxing authorities, inclusive from the original assessment by the tax assessor down to the sale itself. Campbell v. Wilson, 194 Miss. 746, 13 So. 2d 624, 1943 Miss. LEXIS 101 (Miss. 1943).

Failure to allege in bill to confirm a tax title that there was legal process upon or notice to the taxpayer prior to the equalization of the assessment roll was fatal to the validity of a decree, where no certified copy of the list of tax sales to the state was made an exhibit through the bill. Campbell v. Wilson, 194 Miss. 746, 13 So. 2d 624, 1943 Miss. LEXIS 101 (Miss. 1943).

Complaint, in suit to confirm title to land under patent issued plaintiff in 1936, which alleged that prior patent was issued to another in 1926 but failed to allege that original buyer was given notice of sale or that he did not obtain lands in good faith or that price was unfair and unreasonable, was demurrable. Easterling v. Howie, 179 Miss. 680, 176 So. 585, 1937 Miss. LEXIS 65 (Miss. 1937).

In proceeding to confirm tax title, clerk's tax sale books should be made exhibits to bill, or bill should allege that required notice was given to parties whose interests are affected, so that court may see that there are no outside liens. Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32, 1936 Miss. LEXIS 94 (Miss. 1936).

Where a bill to confirm a tax title alleges a valid sale for taxes and exhibits a tax deed in statutory form it cannot be assumed on demurrer that the assessment was under the unconstitutional act of 1888 (laws, p. 24) because the tax deed recites that the sale was for taxes assessed for 1890. Coffee v. Coleman, 85 Miss. 14, 37 So. 499, 1904 Miss. LEXIS 131 (Miss. 1904).

A demurrer to a bill in equity to confirm a tax deed does not admit the validity of the deed, although the bill avers that the recital in the deed of the year for whose taxes the land was sold was a clerical error, that the tax collector intended to have it recite that the sale was made for the year preceding the one actually recited, and that the sale in fact was made for the taxes of the preceding year. Bower v. Chess & Wymand Co., 83 Miss. 218, 35 So. 444, 1903 Miss. LEXIS 35 (Miss. 1903).

9. —Evidence.

In a suit to confirm tax title to land in city assessed and sold to city and state for delinquent taxes, testimony of a person who had platted the subdivision that fence was the dividing line between a platted subdivision and land retained by the former owner as his home was inadmissible. Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477, 1955 Miss. LEXIS 399 (Miss. 1955).

Purchaser at tax sale who seeks to have tax title quieted and confirmed has burden of proving valid assessment of land for taxes and that taxes for which land was offered for sale had not been paid. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950).

Tax deed is prima facie evidence of legal assessment and sale. Jones County Land Co. v. Fox, 120 Miss. 798, 83 So. 241, 1919 Miss. LEXIS 132 (Miss. 1919); Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950); Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477, 1955 Miss. LEXIS 399 (Miss. 1955).

10. —Parties.

A record owner of land by direct chain of title from the government is a necessary party to proceeding to confirm tax title to land against the state and all persons interested therein and, aware that no process was served on him, he is not precluded from asserting the invalidity of the tax sale. Leech v. Masonite Corp., 219 Miss. 176, 68 So. 2d 297, 1953 Miss. LEXIS 379 (Miss. 1953).

In suit to confirm tax title to certain lands and to cancel defendants' claims to interest therein, complainant was not entitled to a decree of confirmation where there was no compliance with the requirements of special process to all persons having or claiming any legal or equitable interests in the lands, although prayer for cancelation of defendants' claims as clouds upon complainant's title was correctly decreed. Stern v. Parker, 200 Miss. 27, 25 So. 2d 787, 1946 Miss. LEXIS 266 (Miss. 1946).

In proceedings to confirm tax titles, the owner of the land at the time of a sale for delinquent taxes is a necessary party. Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404, 1946 Miss. LEXIS 292 (Miss. 1946).

Bill for confirmation of title to land as against persons unknown must comply with the requirements of this section [Code 1942, § 1314] in respect to making such person defendant by notice. Dorsey v. Sullivan, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

In suit by purchaser at tax sale to confirm tax title, failure to make owners of land at time of sale, who were known to purchaser, parties to suit, held reversible error, notwithstanding that their interest had been divested by trust deed foreclosure sale subsequent to tax sale. Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32, 1936 Miss. LEXIS 94 (Miss. 1936).

Proceeding to confirm tax titles held void because publication of summons was for unknown parties only, though apparent owners appeared on face of pleadings. Paepcke-Leicht Lumber Co. v. Savage, 137 Miss. 11, 101 So. 709, 1924 Miss. LEXIS 196 (Miss. 1924).

Owners of land sold for taxes necessary parties defendant to proceedings to confirm tax titles and those acquired by adverse possession. Paepcke-Leicht Lumber Co. v. Savage, 137 Miss. 11, 101 So. 709, 1924 Miss. LEXIS 196 (Miss. 1924).

Bill to confirm tax title is demurrable where one named in the tax deed exhibited as the person assessed with the taxes for which the land was sold is not made a defendant. Smith v. W. Denny & Co., 90 Miss. 434, 43 So. 479, 1907 Miss. LEXIS 75 (Miss. 1907).

11. —Decree.

Decree confirming complainant's title to all minerals on or under certain land cannot stand where decree was taken against defendant prior to the due date of its answer, plea or demurrer. Kalmia Realty & Ins. Co. v. Hendrix, 25 So. 2d 407 (Miss. 1946).

Confirmation decree is void and no defense to ejectment suit by those claiming under owner where a state conveyed to complainant, a stranger to the title, before redemption period expired. Magee v. Turner, 92 Miss. 438, 46 So. 544, 1908 Miss. LEXIS 241 (Miss. 1908).

Upon decree quieting complainant's title to land and cancelling defendant's tax title: (a) it was proper to allow defendant the sum paid by him as purchaser at tax sale with 25% damages and 10% per annum interest thereon, the land being taxable at time of sale; but (b) where land not taxable at the time it was proper to disallow defendant money paid state to redeem, and allow him only taxes paid after land became taxable with 6% per annum thereon; and (c) it was improper not to divide costs of an accounting equally between the parties, there being charges against both; and (d) it was improper to disallow complainant's well proven claim for rent on part of the land. McMahon v. Yazoo Delta Lumber Co., 92 Miss. 459, 43 So. 957, 1908 Miss. LEXIS 172 (Miss. 1908).

Confirmation of a tax title carries with it the right of way of a railroad company, but not its tracks and superstructure. Illinois C. R. Co. v. Le Blanc, 74 Miss. 650, 21 So. 760, 1897 Miss. LEXIS 57 (Miss. 1897).

RESEARCH REFERENCES

ALR.

Real property quiet-title actions against United States under Quiet Title Act (28 USCS § 2409a). 60 A.L.R. Fed. 645.

Am. Jur.

27A Am. Jur. 2d, Equity §§ 17, 20.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 31 (Complaint, petition, or declaration by purchaser of tax-deeded

property to quiet title).

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 32 (Complaint, petition, or declaration by owner of property to remove tax deed as cloud on title).

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-3. Confirmation of state land patents.

Any patentee, or any person, firm or corporation, claiming title or other interest in land under or through any patentee by virtue of any patent issued by the state for lands forfeited to the state for nonpayment of taxes, whether such claimant be in possession or not, or be threatened to be disturbed in his possession or not, may proceed as party plaintiff against the state, as a party defendant, by sworn complaint in the chancery court of the county where the land, or some part thereof, is situated, to have such title or interest confirmed and quieted. No deraignment of plaintiff's title in such cases shall be required.

HISTORY: Codes, 1942, § 1315; Laws, 1940, ch. 309; Laws, 1991, ch. 573, § 33, eff from and after July 1, 1991.

Cross References — Effect of actual occupation under tax title, see § 15-1-15.

Confirmation of bridge and park commission's title to submerged lands, see § 55-7-13 et seq.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rule 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Parties.
3. Validity of assessment.
4. Effect of invalid tax sale.

1. In general.

Where an action was brought in 1945 against the state to confirm a forfeited tax land patent and there was an adjudication of validity of the patent, and that though fraud had been perpetrated, the land commissioner and attorney general properly refused to cancel the tax sale to state and patent issued thereunder in an action brought therefor in 1949 by the heirs of the original owner of forfeited lands. Carney v. Anderson, 214 Miss. 504, 58 So. 2d 13, 1952 Miss. LEXIS 494 (Miss. 1952).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79, 1951 Miss. LEXIS 426 (Miss. 1951).

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

The purpose of this act was to stabilize and validate public land titles and promote the private use and enjoyment of such land, to quiet title to same, and to enable owners thereof to procure full right of ownership and title in fee simple thereto. State v. Cummings, 203 Miss. 583, 35 So. 2d 636, 1948 Miss. LEXIS 310 (Miss. 1948).

Where bank and its lessee sought confirmation of tax title in two separate suits based upon two different tax sales of the same land to the state, which suits had been consolidated, chancellor did not err in rescinding order of consolidation. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

The benefit of this statute relating to validity and quieting title based on tax forfeited land patents is available to purchasers who acquired land through patents issued subsequently to its enactment, as well as to those who acquired land through patents issued prior to its passage. State v. Lewis, 192 Miss. 890, 7 So. 2d 871, 1942 Miss. LEXIS 71 (Miss. 1942).

Nor does this statute violate § 95 of the Constitution of 1890, nor the constitutional provision (§ 100, Const. 1890) prohibiting the remission, relief or postponement by the legislature of any obligation or liability held or owned by the state. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

This is a procedural statute, under which the claimant of tax forfeited lands, in the event of his not being guilty of fraud or violation of any positive statute can obtain a judicial determination of this fact; and the presumption is in favor of the existence and due performance of all the conditions upon which the validity of the patent depends. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

This statute does not violate §§ 87 and 90(u) of the Constitution of 1890, forbidding the enactment of special or local laws in certain enumerated cases. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942); State v. Lewis, 192 Miss. 890, 7 So. 2d 871, 1942 Miss. LEXIS 71 (Miss. 1942).

2. Parties.

A record owner of land by direct chain of title from the government is a necessary party to proceeding to confirm tax title to land against the state and all persons interested therein and aware that no process was served on him, he is not precluded from asserting the invalidity of the tax sale. Leech v. Masonite Corp., 219 Miss. 176, 68 So. 2d 297, 1953 Miss. LEXIS 379 (Miss. 1953).

In suit to confirm tax title to certain lands and to cancel defendants' claims therein, complainant was not entitled to a decree of confirmation where there was no compliance with the requirement of this section [Code 1942, § 1315] that the state be made a party with process served on the attorney general, although complainant was entitled to a decree canceling defendants' claim as clouds upon complainant's title. Stern v. Parker, 200 Miss. 27, 25 So. 2d 787, 1946 Miss. LEXIS 266 (Miss. 1946).

General statutes as to service on or making the land commissioner a party on behalf of the state, do not apply to proceedings brought under this section [Code 1942, § 1315]. Pace v. Wedgeworth, 198 Miss. 1, 20 So. 2d 842, 1945 Miss. LEXIS 162 (Miss. 1945).

Intervenor, in filing cross-bill claiming title to the land in proceeding by patentee under this section [Code 1942, § 1315] to quiet title thereto, was not required to have process served on the state land commissioner. Pace v. Wedgeworth, 198 Miss. 1, 20 So. 2d 842, 1945 Miss. LEXIS 162 (Miss. 1945).

3. Validity of assessment.

In suit to confirm tax title wherein state and original complainants claiming through purchasers thereof from state, specifically alleged that land in question had been duly and legally assessed, and former owner denied legality of assessment, both original complainants and state under its cross-bill were required in order to obtain such relief to prove that the land had been duly and legally assessed. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

Specific allegations by original complainants and state in suit to confirm tax title that land in question, situated in the first judicial district of Jones county, was duly and legally assessed would include approval of assessment rolls in first judicial district of such county at the August meeting of the Board of Supervisors sitting at Ellisville in such district. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

Where proof, which went in without objection in trial court, disclosed affirmatively that the minutes of the meeting of the board of supervisors of Jones County at Ellisville, at which order approving assessment rolls of the first judicial district of such county was entered, were not signed by the president of the board as required by law, effect of failure to sign the minutes on the validity of the assessment and subsequent tax sale of land assessed was sufficiently raised by former owner's denial of legality of the assessment as alleged in the original bill and cross-bill of the state in suit to confirm tax title. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

Where the only sitting of the board of supervisors of Jones County at Ellisville in the First Judicial District during August was on a specific date at which an order was entered for approval of the assessment roll for lands in the First Judicial District, and the minutes for such meeting were not signed by the president of the board, the assessment and subsequent tax sale based thereon were void, and state acquired no title by virtue of such sale as to warrant confirmation thereof either by the state or persons claiming through purchasers from the state. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

Assessment description of certain lands as "N W ¼ S W ¼, less 6A, Section 2, Township 2, Range 18," although containing patent ambiguity by reason of the statement "less 6A," did not render the tax sale to the state void because of indefinite description where the tax conveyance to the state contained a clue, which traced through the assessment rolls and the deeds of conveyances, ultimately led to a definite description of excepted 6 acres, the assessment rolls and deeds of conveyances being admissible in evidence to clarify the ambiguity. Jefferson v. Walker, 199 Miss. 705, 24 So. 2d 343, 1946 Miss. LEXIS 241 (Miss. 1946).

4. Effect of invalid tax sale.

Decree in a confirmation suit adjudicating the validity of a patent from the state to tax forfeited land, which did not purport to affect claims of defendant in a subsequent quiet title action either by adverse possession or under a quitclaim deed from the owner at the time of the tax sale, does not preclude such defendant from asserting adverse possession or invalidity of the tax sale. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

One bringing an action under this section [Code 1942, § 1315] was not entitled to a decree confirming his title as vendee of a patentee where the tax sale to the state after the regular time for sale had passed was void because the board of supervisors had fixed the time for such sale before the regular date therefor had expired. Hooper v. Walker, 201 Miss. 158, 29 So. 2d 72, 1947 Miss. LEXIS 381 (Miss. 1947).

Where neither the state, the patentees, nor subsequent vendees of land sold to the state for taxes acquired any title thereto because of invalidity of tax sales, oil company taking lease from subsequent vendee acquired no greater right than the state had, even though it may have been innocent of the want of authority of its lessor to purchase the land, and, therefore, a decree confirming the lease was erroneous. Merchants & Mfgs. Bank v. State, 200 Miss. 291, 25 So. 2d 585, 1946 Miss. LEXIS 293 (Miss. 1946).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-5. Confirmation of state land patents; duty of attorney general.

The attorney general, in proper cases after investigation, shall file an answer in all such cases setting up any defense on the part of the state of Mississippi, and all of the pleadings in such cases shall be the same as in other cases in chancery. The said cause shall be heard and determined as other cases in chancery.

HISTORY: Codes, 1942, § 1316; Laws, 1940, ch. 309.

Cross References — Constitutional provision conferring power upon chancery court to decree title to real estate, see Miss. Const. Art. 6, § 160.

Another section derived from same 1942 code section, see § 11-17-7.

Confirmation of bridge and park commission's title to submerged lands, see §§ 55-7-15, 55-7-17.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by a bank against the state to quiet title where the rights and remedies of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and where the patent was void, the absence of a specific plea of statute of limitations was not defective and the bank was not entitled to quiet title. State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79, 1951 Miss. LEXIS 426 (Miss. 1951).

Dismissal of suit to confirm forfeited tax patent, upon adjudication of invalidity, without cancelation of invalid patents, was proper, in absence of cross-bill by state asking such affirmative relief. State v. Harper, 195 Miss. 580, 15 So. 2d 680, 16 So. 2d 29, 1943 Miss. LEXIS 162 (Miss. 1943).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-7. Confirmation of state land patents; powers of court.

The court is hereby granted large discretion and far reaching powers in the matter of establishing and fixing the validity of land patents issued by the state and title conveyed thereunder, and the sound discretion of the court in deciding all such cases shall be the controlling factor in settling the issues where only state interests are involved. No decree pro confesso shall be taken against the state, but on failure of the attorney general to answer within the time required by law, the cause shall be heard on the bill and proof thereon.

HISTORY: Codes, 1942, § 1316; Laws, 1940, ch. 309.

Cross References — Constitutional provision conferring power upon chancery court to decree title to real estate, see Miss. Const. Art. 6, § 160.

Another section derived from same 1942 code section, see § 11-17-5.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

The rule that even where the debt secured by a mortgage is barred by the statute of limitations, the mortgagee cannot be deprived of possession by the mortgagor until the debt is paid does not apply in an action by a bank against the state to quiet title where the rights of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and the patent was void. State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79, 1951 Miss. LEXIS 426 (Miss. 1951).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79, 1951 Miss. LEXIS 426 (Miss. 1951).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-9. Confirmation of state land patents; decree; effect of fraud and failure to pay purchase price.

Upon the hearing of such cases, it shall be the duty of the chancery court to enter a decree validating and perfecting the title of said land from the state of Mississippi, unless it shall appear to the court and the court shall find as a fact that the state has not acquired title to said land by virtue of said tax sale, or that the title to the said land involved in the suit was divested out of the state of Mississippi without payment of purchase price or by reason of actual fraud on the part of the patentee, or his representatives. In such cases of fraud and failure to pay purchase price, the chancery court shall enter a decree forever annulling and cancelling the said patent; but no patent heretofore issued shall be cancelled in such proceeding because of loss of the application papers to purchase said land, or because of errors or omissions or incorrect statements in said application, or other papers in connection with the sale of said land, such matters not constituting fraud as above defined.

HISTORY: Codes, 1942, § 1317; Laws, 1940, ch. 309.

Cross References — Suits to cancel patents to lands fraudulently obtained or issued, see § 29-1-9.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Fraud of patentee.
3. Payment of purchase price.
4. Errors or omissions.

1. In general.

It was not the intention of the legislature that this section [Code 1942, § 1317] would in any way effect § 4109, Code of 1942, which makes provisions as to who may not purchase public lands. State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79, 1951 Miss. LEXIS 426 (Miss. 1951).

Where five years after issuance of a state land patent sought to be cancelled by the state the land was again sold for taxes, after which the purchaser at the latter tax sale sold the property to third parties, and some ten years had elapsed since issuance of the patent during which the land was taxed as private property, the equities of the innocent purchasers were protected by the patent as highest evidence of title. State ex rel. McCullen v. Sproles, 200 Miss. 678, 28 So. 2d 218, 1946 Miss. LEXIS 338 (Miss. 1946).

Dismissal of suit to confirm forfeited tax patent, upon adjudication of invalidity, without cancelation of invalid patents, was proper, in absence of cross bill by state asking such affirmative relief. State v. Harper, 195 Miss. 580, 15 So. 2d 680, 16 So. 2d 29, 1943 Miss. LEXIS 162 (Miss. 1943).

This section [Code 1942, § 1317] was construed to be in keeping with the declared intention in Code 1942, § 1321, that the same should be liberally construed to validate and quiet title to such lands as had been theretofore patented, leaving the courts free and unhampered by any suggestions from the legislature in deciding such issues as might arise in suits to confirm and quiet title under patents thereafter issued. State v. Lewis, 192 Miss. 890, 7 So. 2d 871, 1942 Miss. LEXIS 71 (Miss. 1942).

This section [Code 1942, § 1317] does not violate the constitutional provision (§ 87) prohibiting special or local laws in cases which are or can be provided for by general law or the constitutional provision (§ 90 u) forbidding the passage of local, private, or special laws with respect to granting any land under the control of the state to any person or corporation. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

2. Fraud of patentee.

This section [Code 1942, § 1317] requires establishment of actual fraud on the part of the patentee, or his representative, in procuring the patent before it can be cancelled on the ground of fraud. State v. Cummings, 203 Miss. 583, 35 So. 2d 636, 1948 Miss. LEXIS 310 (Miss. 1948).

Actual fraud is intentional fraud, an intent to deceive being an essential element thereof; it means fraud according to the common conscience, and that the party charged therewith was inspired by a deliberate, fraudulent purpose to injure and deceive the party complaining; it implies deceit, artifice and design, and imports the active operation of the mind; it consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed; and it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent, cheat or deceive another, falsehood being an ingredient thereof. State v. Cummings, 203 Miss. 583, 35 So. 2d 636, 1948 Miss. LEXIS 310 (Miss. 1948).

Actual fraud requiring cancellation of patent from state was not shown by evidence as to defendant's answers to questions in his application for purchase of tax forfeited land with respect to acres of timber thereon and as to the amount of state land purchased by applicant during a particular year. State v. Cummings, 203 Miss. 583, 35 So. 2d 636, 1948 Miss. LEXIS 310 (Miss. 1948).

In determining whether patentee committed fraud in deliberately misrepresenting the value of the land, such value is determinable as of the date of the patent and not as of the date of the trial. Jefferson v. Walker, 199 Miss. 705, 24 So. 2d 343, 1946 Miss. LEXIS 241 (Miss. 1946).

Lessee of patentee having notice when it purchased its lease of actual fraud committed by the patentee in deliberately misrepresenting the value of the land is bound by such fraud. Jefferson v. Walker, 199 Miss. 705, 24 So. 2d 343, 1946 Miss. LEXIS 241 (Miss. 1946).

Construction of the phrase "actual fraud on the part of the patentee, or his representative," contained in this section [Code 1942, § 1317] was not unconstitutional as suspending the operation of any general law for the benefit of any individual, private corporation or association. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

Words "actual fraud on the part of the patentee or his representative," are construable to mean such fraud in the procurement of the patent as the making of false statements to, or intentionally withholding important information from, the state land commissioner as to material facts in regard to which the applicant is required to make a disclosure under oath, and which false representations were either known to be false or were made in reckless disregard of whether the same were true or false. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

3. Payment of purchase price.

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

In an action to quiet title to tax forfeited land which plaintiff had obtained by patent from the state, the validity of which had been confirmed by an action against the state, defendant, claiming title under a quitclaim deed from the record owner and by adverse possession, could not challenge the validity of such patent on the ground of grossly inadequate consideration, since the validity of a patent from the state can be challenged only in a proceeding instituted for that purpose by the state land commissioner on behalf of the state. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

The mere fact that the treasurer's receipt for the purchase price of land was not on file more than ten years after the issuance of a patent was not sufficient alone to overturn the solemn recitals of the patent as to its payment. State ex rel. McCullen v. Sproles, 200 Miss. 678, 28 So. 2d 218, 1946 Miss. LEXIS 338 (Miss. 1946).

The phrase "without payment of purchase price," would be construed to mean a purchase price not so grossly inadequate as to amount to a donation of the land from the state to the patentee in contravention of the constitutional provision (§ 95) prohibiting the donation, directly or indirectly, to individuals or corporations, of any of the land belonging to, or under the control of the state. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

4. Errors or omissions.

Record evidence, such as the deed record and assessment rolls, are competent in aid and clarification of the description of land sold at tax sale, so that such evidence may save the tax sale even though otherwise it would be invalid because of indefinite description. Simmons v. State, 199 Miss. 271, 24 So. 2d 660, 1946 Miss. LEXIS 192 (Miss. 1946).

Where tax sale to state was illegal because of indefinite description of the land so that the state acquired no title thereby, title of claimant under patent from state could not be quieted and confirmed as between claimant and the state, although the state alone was made a party respondent and the state conveyed by the patent what it got under the tax sale. Simmons v. State, 199 Miss. 271, 24 So. 2d 660, 1946 Miss. LEXIS 192 (Miss. 1946).

Description of land in tax sale to the state as the NE ¼ of the NE ¼ "less 2a" in a designated section, township, and range, was too indefinite and the tax sale was consequently illegal, unless the description could be aided and clarified by record evidence, such as the deed records and assessment rolls. Simmons v. State, 199 Miss. 271, 24 So. 2d 660, 1946 Miss. LEXIS 192 (Miss. 1946).

Assessment description of certain lands as "N W ¼ S W ¼, less 6A, Section 2, Township 2, Range 18," although containing patent ambiguity by reason of the statement "less 6A," did not render the tax sale to the state void because of indefinite description where the tax conveyance to the state contained a clue, which traced through the assessment rolls and the deeds of conveyance, ultimately led to a definite description of excepted 6 acres, the assessment rolls and deeds of conveyance being admissible in evidence to clarify the ambiguity. Jefferson v. Walker, 199 Miss. 705, 24 So. 2d 343, 1946 Miss. LEXIS 241 (Miss. 1946).

The words "errors or omissions or incorrect statements in said application," contained in the final provision hereof, should be construed to mean errors, omissions or incorrect statements not amounting to fraud, within the meaning of the statute, since the preceding portion of this section authorizes the court upon the hearing of such cases to refuse to validate or perfect the title in the complainant where actual fraud has been perpetrated upon the state in obtaining the patent, and directs the granting of affirmative relief to the state in such case, rather than to permit a donation of the land in violation of the Constitution. State v. Roell, 192 Miss. 873, 7 So. 2d 867, 1942 Miss. LEXIS 70 (Miss. 1942).

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity § 4.
37 Am. Jur. 2d, Fraud and Deceit §§ 192- 193.

CJS.
30A C.J.S., Equity §§ 47-52.

§ 11-17-11. Confirmation of state land patents; appeals.

Any of the parties to the suit may appeal as in other proceedings in chancery, provided any interlocutory appeal is taken within ten days after the rendition of the decree from which the appeal is desired, and provided that any final appeal is taken within sixty days from the date of the rendition of the final decree.

HISTORY: Codes, 1942, § 1318; Laws, 1940, ch. 309.

Cross References — Appeals from final decree, see § 11-51-3.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity §§ 132, 133.

§ 11-17-13. Confirmation of state land patents; res judicata.

Any land patent and title perfected by a decree in a suit under Sections 11-17-3 through 11-17-17 shall forever estop and preclude the state and other parties from thereafter questioning the validity of the patent involved in such proceeding.

HISTORY: Codes, 1942, § 1319; Laws, 1940, ch. 309.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

Decree in a confirmation suit adjudicating the validity of a patent from the state to tax forfeited land, which did not purport to affect claims of defendant in a subsequent quiet title action either by adverse possession or under a quitclaim deed from the owner at the time of the tax sale, does not preclude such defendant from asserting adverse possession or invalidity of the tax sale. Comfort v. Landrum, 52 So. 2d 658, 1951 Miss. LEXIS 531 (Miss. 1951).

RESEARCH REFERENCES

ALR.

Admissibility of evidence of, or propriety of comment as to, plaintiff-spouse's remarriage, or possibility thereof, in action for damages for death of other spouse. 88 A.L.R.3d 926.

Am. Jur.

27A Am. Jur. 2d, Equity § 124.

§ 11-17-15. Confirmation of state land patents; duty of district attorney and county attorney.

It is hereby made the duty of the district attorneys and county attorneys in their respective jurisdictions to fully cooperate with the attorney general in the investigation and trial of all cases filed under Sections 11-17-3 through 11-17-17; and, at the request of the attorney general, such officers shall investigate the facts involved and file such answers and perform such other reasonable services in connection therewith as the attorney general may request.

HISTORY: Codes, 1942, § 1320; Laws, 1940, ch. 309.

Cross References — Authority of attorney general to require assistance of district attorney, see § 7-5-37.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR.

Construction of "marketable title," ancient claims extinguishment," and like statutes, terminating or limiting enforcement of claims respecting real property, based on old records, instruments, or events. 71 A.L.R.2d 846.

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-17. Confirmation of state land patents; construction of Sections 11-17-3 through 11-17-17.

Sections 11-17-3 through 11-17-17 shall be liberally construed to validate and quiet title to lands heretofore passing under patent from the state and shall in no way be construed as repealing or limiting any other statutes now existing in aid of such titles under patents from the state.

HISTORY: Codes, 1942, § 1321; Laws, 1940, ch. 309.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Statutory provisions making it the duty of the courts to enter a decree validating and perfecting title based on tax-forfeited land patents, etc., were construed to be in keeping with the declared intention in this section that the same should be liberally construed to validate and quiet title to such lands as had been theretofore patented, leaving the courts free and unhampered by any suggestions from the legislature in deciding such issues as might arise in suits to confirm and quiet title under patents thereafter issued. State v. Lewis, 192 Miss. 890, 7 So. 2d 871, 1942 Miss. LEXIS 71 (Miss. 1942).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

§ 11-17-19. Confirmation of title or interests granted by political subdivision.

Any person, firm or corporation which claims title to or a leasehold or other interest in any real property, other than sixteenth section school lands or lands granted in lieu thereof, under or by virtue of a sale, conveyance or lease of such property by any county, municipality, supervisor's district, or other political subdivision of the State of Mississippi, acting either separately or jointly, may proceed by sworn complaint in the chancery court of the county in which such real property, or some part thereof, is located, to have the title to or leasehold or other interest in such real property quieted and confirmed. Such action may be brought whether or not such person, firm or corporation be in possession of such real property, or whether he or it be threatened to be disturbed in such possession or not. In such complaint, the person, firm or corporation claiming such title or leasehold or other interest shall be the party plaintiff and there shall be made defendants thereto the county, municipality or other political subdivision which sold, conveyed or leased said property, the Attorney General of the state and the district attorney of the county in which said suit is filed. In any such suit, it shall not be necessary that the plaintiff therein deraign his title to said property.

HISTORY: Codes, 1942, § 1322-01; Laws, 1954, ch. 248, § 1; Laws, 1991, ch. 573, § 34, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity §§ 17, 20.
65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS.
30A C.J.S., Equity §§ 86-93.

§ 11-17-21. Proceedings in suit for confirmation of title granted by political subdivision; defaults.

All proceedings in said suit shall be governed by the Mississippi Rules of Civil Procedure. However, no default judgment shall be entered against the defendants unless the court determines the truth of the averments after a hearing pursuant to the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1942, § 1322-02; Laws, 1954, ch. 248, § 2; Laws, 1991, ch. 573, § 35, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity §§ 17, 20.
65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS.
30A C.J.S., Equity §§ 84-99, 129.

§ 11-17-23. Confirmation of title or interest granted by political subdivision; decree; res judicata.

In all such proceedings the court shall find whether the sale, conveyance or lease of such real property was lawful and valid. Upon the hearing of such case, the chancery court shall enter a decree validating and confirming the complainant's title to or leasehold or other interest in such real property as against the defendants in said suit, unless it shall appear to the court and the court shall find that the title thereto or leasehold or other interest therein was not lawfully and validly acquired by virtue of the sale, conveyance or lease under which such complainant claims, in which latter case the chancery court shall enter a decree annulling and cancelling such sale, conveyance or lease, or such other decree as the court may find to be lawful, just and equitable in such case. When any sale, conveyance or lease of any such property shall be confirmed and validated under the provisions of Sections 11-17-19 through

11-17-27 by decree of the chancery court, such decree shall forever estop and preclude the defendants and all other parties from thereafter questioning the validity of the sale, conveyance or lease involved in such proceedings.

HISTORY: Codes, 1942, § 1322-03; Laws, 1954, ch. 248, § 3.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity § 124.
65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 60- 63.

§ 11-17-25. Confirmation of title or interest granted by political subdivision; appeals.

Any of the parties to a confirmation suit filed under the provisions of Sections 11-17-19 through 11-17-27 may appeal from the decree of the chancery court in the manner and within the time provided by law, and such appeals shall be heard as are other cases of appeals from the decrees of the chancery court.

HISTORY: Codes, 1942, § 1322-04; Laws, 1954, ch. 248, § 4.

Cross References — Appeal from final decree, see § 11-51-3.
Appeal from final decree, see § 11-51-3.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
27A Am. Jur. 2d, Equity §§ 107.

§ 11-17-27. Confirmation of title or interest granted by political subdivision; applicability of Sections 11-17-19 through 11-17-27.

Sections 11-17-19 through 11-17-27 shall be applicable to all sales, conveyances and leases of real property, other than sixteenth section school lands or lands granted in lieu thereof, made by any county, municipality, supervisor's district or other political subdivision of the State of Mississippi, acting either jointly or separately, to any person, firm or corporation, including, but not being limited to, sales, conveyances and leases made under the authority of Sections 57-1-1 through 57-1-51, any other statute of the State of Mississippi, whether same be general, special or local and private, and sales, conveyances and leases made under the general authority of counties, municipalities, and other political subdivisions, whether same were authorized by a specific statute or not.

HISTORY: Codes, 1942, § 1322-05; Laws, 1954, ch. 248, § 5.

Cross References — Sales, conveyances, and leases executed by agricultural and industrial board, see § 57-1-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-17-29. Any other title may be confirmed.

The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted. The law for notice, process, proceedings, and practice, as provided for confirming and quieting tax titles shall apply, no matter by what tenure the complainant may hold. Unknown and nonresident parties may be made defendants as they are made defendants to proceedings to confirm tax titles. If on the final hearing of any such suit, the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant.

HISTORY: Codes, 1892, § 499; 1906, § 549; Hemingway's 1917, § 306; 1930, § 403; 1942, § 1323.

Cross References — The constitutional jurisdiction of the chancery court to decree title to land, see Miss. Const. Art. 6, § 160.

Proceedings to confirm tax titles, see § 11-17-1.

Necessity to deraign title, see § 11-17-35.

Jurisdiction to determine controverted title in action for partition of property, see § 11-21-9.

Limitations of actions concerning land, see §§ 15-1-7, 15-1-9.

Procedure to establish title if records are lost or destroyed, see § 25-55-31.

Application of this section to action challenging location of public trust tideland boundaries, see § 29-15-7.

Conveyances of land, generally, see § 89-1-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Right to maintain suit to confirm title.
2. —Persons entitled.
3. —Title in complainant.
4. Proceedings in general.
5. —Pleading.
6. —Evidence.
7. —Decree.
8. Res judicata.

1. Right to maintain suit to confirm title.

Although generally a suit to confirm title may not be brought if there is a party defendant in possession of the land, a bill of complaint containing not only a prayer for confirmation of title but also a prayer for cancellation of adverse claims and the issuance of an injunction removing one in possession from the premises was not a simple bill to confirm title, and a motion to dismiss was properly overruled. Yellow Cab & Car Rental Co. v. Dependents of Lecamu, 207 So. 2d 604, 1968 Miss. LEXIS 1613 (Miss. 1968).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to railroad right of way, and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove clouds on title rather than suit to quiet and confirm title. Jones v. New Orleans & N. R. Co., 214 Miss. 804, 59 So. 2d 541, 1952 Miss. LEXIS 522 (Miss. 1952).

Bill to establish and quiet title to land in lieu of an ordinary action at law in ejectment can properly be maintained only when the land is not in possession of one claiming adversely to the complainant. White v. Turner, 197 Miss. 265, 19 So. 2d 825, 1944 Miss. LEXIS 295 (Miss. 1944); Hume v. Inglis, 154 Miss. 481, 122 So. 535, 1929 Miss. LEXIS 151 (Miss. 1929).

Under this section [Code 1942, § 1323] a complainant cannot maintain a suit to confirm her title to land, where the land is occupied by the defendant at the time, it being essential that the complainant show either that she is in possession of the land, or that she is the owner and the land is unoccupied. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

Where a complainant's husband deserted her in 1920, while they resided on and occupied certain land as their home, and the wife continued to occupy the land as her home and to claim it until 1934, when she was forced out of possession by the defendant, she established a claim of title by adverse possession, which enabled her to maintain a suit to recover possession and remove the cloud upon her title. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

Where the entire record of a former suit brought by complainant against defendants and others to confirm her title in the land in question, which record was made a part of the instant suit, showed that the complainant claimed to be in possession and that there was no adverse possession as against allegations to the contrary, and her amended bill in the instant action for damages for the taking of timber from such land, and to obtain a writ of possession and other relief, showed not only a tax sale as foundation for her title but also a deed of trust from defendant, with foreclosure thereof and mesne conveyances to complainant as another source of title, the action was one within the class to confirm title under this section [Code 1942, § 1323]. Norton v. Graham, 185 Miss. 164, 187 So. 510, 1939 Miss. LEXIS 136 (Miss. 1939).

Complainant must show that he is in actual possession of the land or that there is no adverse possession. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485, 1905 Miss. LEXIS 213 (Miss. 1905).

2. —Persons entitled.

A suit to confirm title to land may not be brought if there is a party defendant in possession, and the bill must show that either complainant is in the actual occupancy of the land, or if out of possession, that there is no actual adverse occupancy. Allen v. Thomas, 215 So. 2d 882, 1968 Miss. LEXIS 1386 (Miss. 1968).

One who has been in adverse possession for ten years by exchange of lands with another, claiming to be the owner from that time, may maintain a bill to have his title confirmed. Bynum v. Stinson, 81 Miss. 25, 32 So. 910, 1902 Miss. LEXIS 119 (Miss. 1902).

The owner of a leasehold interest in a sixteenth section may maintain a bill under this section [Code 1942, § 1323]. Osburn v. Board of Sup'Rs., 71 Miss. 19, 14 So. 457, 1983 Miss. LEXIS 3093 (Miss. 1983).

3. —Title in complainant.

In a suit to confirm title to land and cancel and remove as a cloud on the title to the land adverse claims thereto, and for possession and rent, the complainant was required to show a good title in herself. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

Complainant has burden of showing perfect title in himself to maintain bill to remove clouds and establish his title to land. Nicholson v. Myres, 170 Miss. 441, 154 So. 282, 1934 Miss. LEXIS 106 (Miss. 1934).

Complainant in bill to confirm title and remove clouds must show good title in himself. Camp v. Celtic Land & Improv. Co., 129 Miss. 417, 91 So. 897, 1922 Miss. LEXIS 30 (Miss. 1922).

4. Proceedings in general.

Circuit court properly transferred a

case to a chancery court because the case involved a title dispute over which the chancery court had constitutional and statutory jurisdiction. Barham v. Miss. Power Co., 266 So. 3d 994, 2019 Miss. LEXIS 129 (Miss. 2019).

Where certain issues of fact required determination, an interlocutory appeal was improvidently granted from an order overruling defendant's pleas in bar filed in an action to confirm a tax title. Calmes v. Weill, 216 So. 2d 418, 1968 Miss. LEXIS 1225 (Miss. 1968).

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by § 1325, Code of 1942, or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title from the common source to the necessary parties to the suit, and his bill did not allege that the complainant had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. Warren v. Clark, 230 Miss. 873, 94 So. 2d 323, 1957 Miss. LEXIS 435 (Miss. 1957).

Where defendants in a suit for determination of title to real estate filed cross-bills for confirmation of title in them, predicated on adverse possession and deeds other than those relied on by complainants, complainants had no right to dismiss without prejudice and at the same time secure dismissals of the cross-bills without the consent, express or implied, of the cross-complainants. Hudson v. Gulf Refining Co., 202 Miss. 331, 30 So. 2d 66, 1947 Miss. LEXIS 282 (Miss.), cert. denied, 332 U.S. 775, 68 S. Ct. 84, 92 L. Ed. 359, 1947 U.S. LEXIS 1900 (U.S. 1947).

A prior decree purporting to confirm defendant's title to the land in litigation in an action to which the complainant was not made a party except as he may have been such under a general notice published as process "to all persons having or claiming any interest" is void as to complainant, where the latter on the date the prior suit was filed was in actual possession of the land and defendant had other knowledge of complainant's adverse claim thereto, notwithstanding that complainant knew of the suit but paid no attention to it. Skrmetta v. Moore, 202 Miss. 585, 30 So. 2d 53, 1947 Miss. LEXIS 320 (Miss. 1947), but see Mitchell v. Rawls, 493 So. 2d 361, 1986 Miss. LEXIS 2587 (Miss. 1986).

One exercising such acts of occupancy or dominion over land as to give ample notice that his possession and acts are adverse to the claimant is not bound by general notice published as process "to all persons having or claiming any interest," even though he knows of the suit. Skrmetta v. Moore, 202 Miss. 585, 30 So. 2d 53, 1947 Miss. LEXIS 320 (Miss. 1947), but see Mitchell v. Rawls, 493 So. 2d 361, 1986 Miss. LEXIS 2587 (Miss. 1986).

Complainant may dismiss as to one or more defendants. Wilson v. Foster Creek Lumber & Mfg. Co., 134 Miss. 880, 99 So. 437, 1924 Miss. LEXIS 309 (Miss. 1924).

Where court refused to amend bill inadvertently brought under Code 1906 § 549 instead of § 550, complainant should be allowed to dismiss without prejudice. Russell v. Denson, 98 Miss. 859, 54 So. 439, 1910 Miss. LEXIS 134 (Miss. 1910).

5. —Pleading.

Complaint in suit to confirm title to land under patent from state issued to plaintiff which did not allege that plaintiff was in possession of the land, or that there was no adverse occupancy, was demurrable, since such allegation is necessary in suit to confirm title other than tax title. Easterling v. Howie, 179 Miss. 680, 176 So. 585, 1937 Miss. LEXIS 65 (Miss. 1937).

Bill to quiet title alleging former suit for partition and sale was fraudulent and not by the then owners or their legal representatives, and that plaintiffs were not parties, states a good cause of action. Moore v. Luke, 110 Miss. 205, 70 So. 84, 1915 Miss. LEXIS 24 (Miss. 1915).

Cross-bill need not aver cross-complainants were in possession, or no adverse possession. Smith v. Jassen, 105 Miss.

227, 62 So. 172, 1913 Miss. LEXIS 194 (Miss. 1913).

6. —Evidence.

Chancery court properly rendered title to the property at issue in favor of a deceased father's live-in companion because, while the son allegedly took out a bank loan to purchase property for the father, the son was precluded from confirming title inasmuch as he was not in possession and the property was not unoccupied, the son failed to deraign title, showing perfect title in himself, where the son and the companion claimed title under separate and distinct deeds, and the-prior owner testified that it was his intent to convey the property to the father, the father who provided the check to the former owner as payment for the property, and the son never paid property taxes ormaintenance or upkeep of the property. Smith v. Pettigrew, 223 So. 3d 173, 2017 Miss. App. LEXIS 396 (Miss. Ct. App. 2017).

The presumption that land has been granted to the possessor by the state arises where there is some unexplained anomaly in the chain of title; however, this principle should not be construed to mean that the presumption arises only in the face of such an anomaly. The open and continuous possession of property by the claimants and their predecessors in title from 1892 to the present, together with the usual acts incident to ownership, were sufficient to raise the presumption of a grant. Board of Trustees v. Rye, 521 So. 2d 900, 1988 Miss. LEXIS 61 (Miss. 1988), limited, Bd. of Educ. v. Warner, 853 So. 2d 1159, 2003 Miss. LEXIS 311 (Miss. 2003).

In suit to confirm title to land in which answer sets up ownership by defendants of part of land by adverse possession, proof by defendants as to land adversely possessed by them is admissible, and proper description thereof can be obtained by survey. Chatman v. Carter, 209 Miss. 16, 45 So. 2d 841, 1950 Miss. LEXIS 358 (Miss. 1950).

In suit by heirs to confirm title to 46 acres of land, 15 acres of which defendants claimed through parol gift from complainants' decedent to defendants' deceased predecessor in title which merged with subsequent adverse possession against estate of complainants' decedent, defendants should not be permitted to testify with reference to what was said in making gift of the land and pointing out boundaries as these statements went to question of establishing defendants' claims against estate of decedent. Chatman v. Carter, 209 Miss. 16, 45 So. 2d 841, 1950 Miss. LEXIS 358 (Miss. 1950).

Evidence held not to show continuous actual possession and occupation for statutory period. Dedeaux v. Bayou Delisle Lumber Co., 112 Miss. 325, 73 So. 53, 1916 Miss. LEXIS 114 (Miss. 1916).

7. —Decree.

Where in a suit to confirm a tax sale, § 1314, Code of 1942 and this section [Code 1942, § 1323], as to special process, had not been complied with, and although it was charged that one of the defendants was residing in the state of Georgia, the bill failed to charge that she was a nonresident of Mississippi, and neither the owner of title at the time of the tax sale, if living, nor his heirs, if he was dead, were made parties, the confirmation decree rendered therein was void. White v. Merchants & Planters Bank, 229 Miss. 35, 90 So. 2d 11, 1956 Miss. LEXIS 583 (Miss. 1956).

Decree in suit to confirm title to 46 acres of land that "complainants have no claim, right, title and interest to the land described in the bill of complaint filed herein" is reversible error when defendants claimed interest in only 15 acres and complainant's title to 31 acres was not attacked. Chatman v. Carter, 209 Miss. 16, 45 So. 2d 841, 1950 Miss. LEXIS 358 (Miss. 1950).

Where a suit to confirm title was decided upon general demurrer which was sustained for failure of complainant to show title in himself, the decision was upon the merits as to complainant's want of title. Williams v. Patterson, 203 Miss. 865, 34 So. 2d 366, 1948 Miss. LEXIS 331 (Miss. 1948).

False allegation that there is no adverse possession is a fraud on the court; decree confirming title is void as to defendant in adverse possession where complainant does not proceed under Code 1906, § 550 to have such claim cancelled. Brooks-Scanlon Co. v. Stogner, 114 Miss. 736, 75 So. 596, 1917 Miss. LEXIS 92 (Miss. 1917).

8. Res judicata.

On a bill of complaint by an innocent purchaser for value without notice to confirm, and to quiet title to a tract of land, a prior quiet title action by the purchaser's predecessor concerning the same tract against the same defendants before the same chancellor who quieted title in the predecessor, was res judicata as to the title to the property. Fairley v. Tucker, 253 So. 2d 852, 1971 Miss. LEXIS 1240 (Miss. 1971).

Where a plaintiff in ejectment suit made the same allegations as to right of possession as those made in prior suit for confirmation of title, which was adjudicated against him for failure to show title in himself, decision in confirmation suit was res judicata in ejectment suit. Williams v. Patterson, 203 Miss. 865, 34 So. 2d 366, 1948 Miss. LEXIS 331 (Miss. 1948).

In an action to confirm title and remove clouds, as against defendants' claim of adverse possession and that the period of adverse possession was not interrupted by a decree in a former suit to which the defendants were parties for confirmation of complainant's tax title on the ground that the issue of adverse possession was not involved therein, allegations in the former suit, the record of which was made part of the instant suit, that complainant was in possession and that there was no adverse possession, with defendants' allegations to the contrary, put in issue the defendants' claim of adverse possession and such issue was concluded by the decree in the former suit, foreclosing further inquiry, since the matters existing at the time of the former suit under this section [Code 1942, § 1323] concluded the title as of the date of the decree and not as of the date of the tax sale from which complainant derived title. Norton v. Graham, 185 Miss. 164, 187 So. 510, 1939 Miss. LEXIS 136 (Miss. 1939).

RESEARCH REFERENCES

ALR.

Construction of "marketable title," "ancient claims extinguishment," and like statutes, terminating or limiting enforcement of claims respecting real property, based on old records, instruments, or events. 71 A.L.R.2d 846.

Am. Jur.

27A Am. Jur. 2d, Equity § 40.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Forms 1-115 (Proceedings to quiet title).

CJS.

30A C.J.S., Equity §§ 86-93.

§ 11-17-31. Removing clouds upon titles.

When a person not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt, or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not. Any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner. Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes may proceed hereunder in like manner and may include, as a defendant, any political subdivision of the state, having or asserting any evidence or claim of title adverse to such tax title.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 16 (1); 1857, ch. 62, art. 8; 1871, § 975; 1880, § 1833; 1892, § 500; 1906, § 550; Hemingway's 1917, § 307; 1930, § 404; 1942, § 1324; Laws, 1948, ch. 226.

Cross References — Constitutional jurisdiction to decree title to land, see Miss. Const. Art. 6, § 160.

Necessity to deraign title, see § 11-17-35.

Limitation of actions concerning title to land, see §§ 15-1-7, 15-1-9.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rule 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. —Removal to federal court.
3. Right and propriety of action.
4. —Title in complainant.
5. —Actions by or against particular persons.
6. Parties.
7. Pleading.
8. Evidence.
9. Burden of proof.
10. Relief granted.
11. Judgment or decree.
12. Injunction in aid of remedy.
13. Res adjudicata.

1. Jurisdiction.

Venue was not jurisdictional a brother's action to set aside a deed to the family farm from their mother to a revocable trust, and the sister waived any objection to the suit being heard in the county because the venue issue was never pursued to a ruling in the chancery court. Hodnett v. Hodnett, 269 So. 3d 317, 2018 Miss. App. LEXIS 189 (Miss. Ct. App.), cert. denied, 258 So. 3d 287, 2018 Miss. LEXIS 527 (Miss. 2018).

Chancery court is without jurisdiction of bill by owners of land seeking cancellation of claim of state to lands by reason of pretended tax sales as cloud upon complainants' title after land commissioner, with written approval of attorney general, acting under § 4073, Code 1942, providing for cancellation of claim of state to lands under tax sales when sales are void, has stricken lands from lists of lands sold to state for delinquent taxes because sales were void, since adjudication sought is, in effect, merely ratification of legal action of a state official, lawfully empowered to act, and statute does not provide for ratification by court. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442, 1949 Miss. LEXIS 414 (Miss. 1949).

Where in a suit to enjoin the defendants from foreclosing a deed of trust and to cancel such deed of trust as a cloud upon complainants' title, title to that part of the land covered by the deed of trust situated in the county in which the suit was brought had, at the time suit was brought, matured in the state under tax sales, and the defendants moved to dismiss the suit because the court had no territorial jurisdiction in that the rest of the land was situated in another county, but the suit was dismissed on another ground urged in such motion, defendants' failure on complainants' appeal from dismissal to urge the point that suit could not be maintained in county other than that in which land was situated, constituted waiver of the point. Ravesies v. Martin, 190 Miss. 92, 199 So. 282, 1940 Miss. LEXIS 191 (Miss. 1940).

A suit to cancel a claim against land as a cloud upon the title, where the property is in possession of the complainant and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely in rem in the sense that a court would be wholly without jurisdiction in a county other than where the land is situated. Ravesies v. Martin, 190 Miss. 92, 199 So. 282, 1940 Miss. LEXIS 191 (Miss. 1940).

The statute enlarges the jurisdiction for the purposes of quia timet bills, and must be construed in the light of the doctrines and principles pertaining thereto. Carlisle v. Tindall, 49 Miss. 229, 1873 Miss. LEXIS 109 (Miss. 1873).

2. —Removal to federal court.

Federal district courts, under Judicial Code § 57, have jurisdiction of suits to remove clouds on title in case of nonresident defendants. Louisville & N. R. Co. v. Western Union Tel. Co., 234 U.S. 369, 34 S. Ct. 810, 58 L. Ed. 1356, 1914 U.S. LEXIS 1156 (U.S. 1914).

A suit to remove clouds from titles to land is not within the exclusive jurisdiction of the state courts and may be removed, if the citizenship of the parties justifies it, into the federal court. Day v. Oatis, 85 Miss. 128, 37 So. 559, 1904 Miss. LEXIS 123 (Miss. 1904).

3. Right and propriety of action.

Chancellor properly denied a motion to dismiss filed by a mother and her daughter because the brother's action to set aside the sister's deed, remove the cloud on his title, and to quiet title to the disputed property was governed by the 10-year statutes of limitations where the daughter knew about the brother's deed, the brother was a remainderman who did not yet have the present right to possess the property, and the brother had a present cause of action. Lott v. Saulters, 133 So. 3d 794, 2014 Miss. LEXIS 53 (Miss. 2014).

A property owner is entitled to have a void tax deed set aside as a cloud upon the owner's title. Parsons v. Marshall, 243 Miss. 719, 139 So. 2d 833, 1962 Miss. LEXIS 399 (Miss. 1962).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to railroad right of way, and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove the cloud on title rather than suit to quiet and confirm title. Jones v. New Orleans & N. R. Co., 214 Miss. 804, 59 So. 2d 541, 1952 Miss. LEXIS 522 (Miss. 1952).

In suit to remove cloud upon title, mere improvident contract supplies no basis for relief. Hunt v. Davis, 208 Miss. 710, 45 So. 2d 350, 1950 Miss. LEXIS 290 (Miss. 1950).

In action to remove cloud from title based on unilateral mistake of grantor in description of mineral rights conveyed, mistake to constitute equitable relief must not be merely result of inattention, personal negligence, or misconduct on part of party applying for relief. Hunt v. Davis, 208 Miss. 710, 45 So. 2d 350, 1950 Miss. LEXIS 290 (Miss. 1950).

Unilateral mistake on part of grantor, either as to number of acres under which he owned mineral interest or as to fractional interest in minerals owned, will not support cross-bill to cancel title of grantee to one-fourth of minerals when grantor conveyed one-half of minerals under the land, which was all that grantor owned. Hunt v. Davis, 208 Miss. 710, 45 So. 2d 350, 1950 Miss. LEXIS 290 (Miss. 1950).

An asserted claim of title by adverse possession alone may be a cloud on title within the purview of this section [Code 1942, § 1324] where the same is insufficient in character and duration to satisfy the applicable statute of limitations. Church of Living God, C. W. F. F. v. Curry, 203 Miss. 279, 34 So. 2d 494, 1948 Miss. LEXIS 264 (Miss. 1948).

Taking possession of real property and demolishing and removing the improvements thereon is such an assertion of some claim of right as to have such possession and use cancelled as a cloud upon title. Church of Living God, C. W. F. F. v. Curry, 203 Miss. 279, 34 So. 2d 494, 1948 Miss. LEXIS 264 (Miss. 1948).

Even though an instrument void on its face may be impotent to do practical harm to the title, an action may be brought to cancel it as a cloud on the title. Silvey v. Upton, 202 Miss. 485, 32 So. 2d 267, 1947 Miss. LEXIS 303 (Miss. 1947).

An action to remove cloud on title was properly brought against a municipality by the holder of a tax deed issued by an administration under a procedure different from that adopted by a succeeding administration which had sometimes required the payment of an additional price from the holders of similar deeds. Evans v. Jackson, 201 Miss. 14, 28 So. 2d 249, 1946 Miss. LEXIS 353 (Miss. 1946).

Even though the state acquires no title under an invalid tax sale, such constitutes a cloud upon the title of the rightful owner which he may have cancelled and removed. State v. Butler, 197 Miss. 218, 21 So. 2d 650, 1945 Miss. LEXIS 287 (Miss. 1945).

Possession of the land by complainants, or nonoccupancy of the land, is not a condition precedent to the maintenance of an action to remove a cloud upon the title to the land. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

Where a complainant's husband deserted her in 1920, while they resided on and occupied certain land as their home, and the wife continued to occupy the land as her home and to claim it until 1934, when she was forced out of possession by the defendant, she established a claim of title by adverse possession, which enabled her to maintain a suit to recover possession and remove the cloud upon her title. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

As respects constitutionality of statute providing that action attacking validity of tax sale to state must be brought within two years after land is sold or forfeited to state, fact that statute ran concurrently with portion of period of redemption was immaterial since its effect was not to shorten redemption period and taxpayer was authorized to institute, prior to expiration of period of limitation, a suit to cancel claim of state's patentee as a cloud on his title, whether taxpayer was in possession or not, or whether he was threatened to be disturbed in his possession. Russell Inv. Corp. v. Russell, 182 Miss. 385, 178 So. 815, 182 So. 102, 1938 Miss. LEXIS 130 (Miss. 1938).

This statute must be regarded as entitling the rightful owner of real property in the state to maintain a suit to dispel a cloud cast upon his title by an invalid deed or any other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face. Louisville & N. R. Co. v. Western Union Tel. Co., 234 U.S. 369, 34 S. Ct. 810, 58 L. Ed. 1356, 1914 U.S. LEXIS 1156 (U.S. 1914).

Where court refused to amend bill inadvertently brought under Code 1906 § 549 instead of § 550, complainant should be allowed to dismiss suit without prejudice. Russell v. Denson, 98 Miss. 859, 54 So. 439, 1910 Miss. LEXIS 134 (Miss. 1910).

Suit for removal of cloud will lie whether the cloud be cast by written instrument or mere assertion of a hostile claim; in either case bill must show complainant's good title and facts showing invalidity of defendant's title if they be known. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485, 1905 Miss. LEXIS 213 (Miss. 1905).

Under the facts stated, complainant was held entitled to maintain a bill to cancel or, in the alternative, to have a lien decreed in his favor. Gentry v. Gamblin, 79 Miss. 437, 28 So. 809, 1901 Miss. LEXIS 4 (Miss. 1901).

Clouds may be removed from the reversionary interest in land by the real owner thereof, before the expiration of the particular estate. Fox v. Coon, 64 Miss. 465, 1 So. 629, 1886 Miss. LEXIS 91 (Miss. 1886).

The real owner can file a bill to cancel a paper-title, or a bill for protection against a pretense of title. Cook v. Friley, 61 Miss. 1, 1883 Miss. LEXIS 58 (Miss. 1883).

A bill in chancery can be maintained by the real owner out of possession against a person in possession, to cancel a void tax-deed and a title-bond from one who never had title. Wofford v. Bailey, 57 Miss. 239, 1879 Miss. LEXIS 55 (Miss. 1879).

If the person owning the legal title be estopped to assert it as against complainant, who has a perfect equitable title, the latter may cancel the legal title as a cloud. Shivers v. Simmons, 54 Miss. 520, 1877 Miss. LEXIS 41 (Miss. 1877).

4. —Title in complainant.

A deed which conveyed to a woman her two sons' interest in a piece of land and provided that the deed was made with the full knowledge and understanding of the parties concerned and that, on the mother's death, title to the property would revert to one of the two sons was insufficient to transfer the interest of one brother to the other and upon the mother's death each son was entitled to that portion of the property which he had conveyed to the mother as a life tenant. Avera v. Avera, 341 So. 2d 654, 1977 Miss. LEXIS 2273 (Miss. 1977).

A bill to quiet title should not have been dismissed as to that part of the land to which the complainant had record title, his right to which was contested by a cross-bill setting forth alleged, but not proved, title by adverse possession. Colotta v. Middleton, 201 Miss. 637, 28 So. 2d 847, 1947 Miss. LEXIS 432 (Miss. 1947).

In a suit to confirm title to land and cancel and remove as a cloud on the title to the land adverse claims thereto, and for possession and rent, the complainant was required to show a good title in herself. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245, 1942 Miss. LEXIS 89 (Miss. 1942).

Where the entire record of a former suit brought by complainant against defendants and others to confirm her title in the land in question, which record was made a part of the instant suit, showed that complainant claimed to be in possession and that there was no adverse possession as against allegations therein to the contrary, and her amended bill in the instant suit for damages for the taking of timber from such land, to obtain a writ of possession and other relief, showed not only a tax sale as foundation for her title but also a deed of trust from defendant, with foreclosure thereof and mesne conveyances to complainant as another source of title, the present action was one within the purview of this section [Code 1942, § 1324] in view of allegations of the bill as to title set out in the original bill, as constituting a cloud upon the complainant's title. Norton v. Graham, 185 Miss. 164, 187 So. 510, 1939 Miss. LEXIS 136 (Miss. 1939).

Bill to cancel contract for sale of timber land is within Code 1906 §§ 550, 551, and complainant must deraign title. Eastman v. Wyatt Lumber Co., 102 Miss. 313, 59 So. 93, 1912 Miss. LEXIS 60 (Miss. 1912).

Under this section [Code 1942, § 1324] complainants must show a perfect legal or equitable title independently of defects in defendant's title. Jones v. Rogers, 85 Miss. 802, 38 So. 742, 1904 Miss. LEXIS 106 (Miss. 1904), overruled, Kennedy v. Sanders, 90 Miss. 524, 43 So. 913, 1907 Miss. LEXIS 92 (Miss. 1907), writ of error dismissed, 214 U.S. 196, 29 S. Ct. 635, 53 L. Ed. 965, 1909 U.S. LEXIS 1908 (U.S. 1909); Goff v. Avent, 122 Miss. 86, 84 So. 134, 1920 Miss. LEXIS 421 (Miss. 1920).

The doctrine of common source of title applies. People's Bank of New Orleans v. West, 67 Miss. 729, 7 So. 513, 1890 Miss. LEXIS 120 (Miss. 1890).

Complainant must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover in an action of ejectment. Chiles v. Gallagher, 67 Miss. 413, 7 So. 208, 1889 Miss. LEXIS 36 (Miss. 1889); Wilkinson v. Hiller, 71 Miss. 678, 14 So. 442, 1893 Miss. LEXIS 85 (Miss. 1893).

The complainant must show himself to be the owner in law or in equity of the subject matter in dispute. Hart v. Bloomfield, 66 Miss. 100, 5 So. 620, 1888 Miss. LEXIS 69 (Miss. 1888); People's Bank of New Orleans v. West, 67 Miss. 729, 7 So. 513, 1890 Miss. LEXIS 120 (Miss. 1890).

Complainant must have a perfect legal or a perfect equitable title; and must show the invalidity of his adversary's claim. Toulmin v. Heidelberg, 32 Miss. 268, 1856 Miss. LEXIS 197 (Miss. 1856); Jayne v. Boisgerard, 39 Miss. 796, 1861 Miss. LEXIS 16 (Miss. 1861); Huntington v. Allen, 44 Miss. 654, 1871 Miss. LEXIS 24 (Miss. 1871); Handy v. Noonan, 51 Miss. 166, 1875 Miss. LEXIS 29 (Miss. 1875); Griffin v. Harrison, 52 Miss. 824, 1876 Miss. LEXIS 301 (Miss. 1876).

The complainant must show the entire fairness of his own title. Boyd v. Thornton, 21 Miss. 338, 1850 Miss. LEXIS 25 (Miss. 1850).

5. —Actions by or against particular persons.

Action brought under Mississippi law to remove cloud upon title to real property is action to quiet title to property on which United States has lien, for purposes of statute waiving sovereign immunity for such claims. Norman v. United States, 962 F. Supp. 936, 1996 U.S. Dist. LEXIS 20957 (S.D. Miss. 1996).

Action in which Mississippi resident sought to reform deed of trust securing loan made by Farmers Home Administration (FHA) to remove his homestead and residence from deed was action to remove cloud on title under Mississippi statute, and thus came within waiver by United States of sovereign immunity under statute governing actions affecting real property on which United States has lien. Norman v. United States, 962 F. Supp. 936, 1996 U.S. Dist. LEXIS 20957 (S.D. Miss. 1996).

Warranty deed conveying fee simple title, which contains clause making conveyance subject to reservation of oil, gas and other minerals by prior grantors will not be reformed to reflect intent of present grantor to reserve mineral rights. Miller v. Lowery, 468 So. 2d 865, 1985 Miss. LEXIS 2054 (Miss. 1985).

An administratrix cannot bring suit to recover in her own name lands of the decedent in the absence of her showing a basis for her assumption of this prerogative of the heirs. Clinton v. Robbins, 32 So. 2d 145 (Miss. 1947).

The purchaser at a foreclosure sale under a trust deed is entitled to a decree quieting title as against the mortgagor's wife who obtained a forfeited tax land patent from the state pursuant to its purchase of the property after the foreclosure sale at tax sale for nonpayment of taxes assessed to the mortgagor. Vincent v. J. W. McClintock, Inc., 200 Miss. 445, 27 So. 2d 681, 1946 Miss. LEXIS 308 (Miss. 1946).

Under this section [Code 1942, § 1324] the owner of land out of possession can resort to an equity court to remove clouds and confirm title. Dockery v. Zerkowsky, 186 Miss. 31, 189 So. 797, 1939 Miss. LEXIS 221 (Miss. 1939).

Members of state mineral lease commission which held void deeds to complainants' realty could be made defendants under statute authorizing cancellation suit by rightful owner against person holding invalid deeds, although commission had not taken actual possession of or trespassed upon realty. State Mineral Lease Com. v. Lawrence, 171 Miss. 442, 157 So. 897, 1934 Miss. LEXIS 265 (Miss. 1934).

Rule that equity will not proceed until all parties whose interests will be substantially affected by decree are before court, and fact that state was real party in interest, did not preclude suit against members of state mineral lease commission to cancel void deeds to complainant's realty held by commission. State Mineral Lease Com. v. Lawrence, 171 Miss. 442, 157 So. 897, 1934 Miss. LEXIS 265 (Miss. 1934).

Trustees under void trust are not entitled to maintain a suit to remove cloud from their title on theory that conveyance to them was absolute on failure of trust. Board of Trustees v. Odom, 100 Miss. 64, 56 So. 314, 1911 Miss. LEXIS 15 (Miss. 1911).

One granting right to plant and take oysters from a bay in front of certain property cannot maintain a bill to quiet his title to such rights. Catchot v. Zeigler, 92 Miss. 191, 45 So. 707, 1907 Miss. LEXIS 25 (Miss. 1907).

Purchasers from a county cannot defend a suit by the county to cancel their deed on the ground that the county at the time of its purchase had no power to acquire the property. Jefferson County v. Grafton, 74 Miss. 435, 21 So. 247, 1896 Miss. LEXIS 167 (Miss. 1896).

A purchaser in possession, under a contract to convey to him, who has not paid the purchase money, cannot maintain a bill to cancel the claim of the vendor or representatives upon the ground that the statute of limitation has barred recovery either of the land or its price, unless he offers to pay the purchase money and interest. Nolan v. Snodgrass, 70 Miss. 794, 12 So. 583, 1893 Miss. LEXIS 9 (Miss. 1893).

6. Parties.

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by § 1325, Code of 1942, or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title from the common source to the necessary parties to the suit, and his bill did not allege that the complainant had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. Warren v. Clark, 230 Miss. 873, 94 So. 2d 323, 1957 Miss. LEXIS 435 (Miss. 1957).

As general rule all persons who are materially interested in event or subject matter, without whom no effective judgment or decree can be rendered, should be made parties in suit to quiet title. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

One who enters into conditional contract with complainants in suit to quiet title, after litigation is started, to lease property if and when litigation is terminated in accordance with complainants' views, is not necessary party to suit as he is interested alone in outcome of litigation not inherently in subject matter of suit. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

Either plaintiff or interveners, claiming title to plaintiff's undivided interest in oil land by reason of quitclaim deed from plaintiff subject to plaintiff's right to receive payment for oil produced from the land, were proper parties to maintain action to confirm title to such land and to set aside colessor's agreement executed by plaintiff. White v. Union Producing Co., 140 F.2d 176, 1944 U.S. App. LEXIS 3896 (5th Cir. 1944).

All parties interested may be made defendants so as to afford complete relief. Goff v. Avent, 129 Miss. 782, 93 So. 193, 1922 Miss. LEXIS 89 (Miss. 1922).

A mortgagor who, by limitation, is barred of all equity of redemption and who has conveyed all interest in the land, is neither a necessary nor proper party to a bill to remove clouds. Tuteur v. Brown, 74 Miss. 774, 21 So. 748, 1897 Miss. LEXIS 53 (Miss. 1897).

7. Pleading.

Chancellor does not abuse his discretion by allowing, after answer is filed, amendment to bill changing date of foreclosure sale from which date defendants claimed adversely, where effect of amendment was merely to increase burden upon defendants in establishing duration of period of their claimed adverse possession. Duncan v. Mars, 44 So. 2d 529 (Miss. 1950).

Demurrer on ground that there is no equity on face of cross-bill should be overruled when cross-bill, filed in suit founded on former court decree, reviews history of former court proceeding setting out facts showing decree was void and did not affect title to land, partition of which is sought in original bill, and cross-bill prays that claim of cross-defendant be cancelled as cloud upon title of cross-complainant. Natis v. Jackson, 205 Miss. 490, 38 So. 2d 925, 1949 Miss. LEXIS 446 (Miss. 1949).

One alleging that he and the defendant derived their title from a common source must show by proper allegation that his title from that source is the better. Woodard v. Moss, 202 Miss. 33, 30 So. 2d 420, 1947 Miss. LEXIS 237 (Miss. 1947).

A bill alleging that title was derived from named persons who were heirs at law of a named decedent was insufficient for failing to allege that the persons named were sole heirs at law. Woodard v. Moss, 202 Miss. 33, 30 So. 2d 420, 1947 Miss. LEXIS 237 (Miss. 1947).

Bill to quiet title, not alleging deraignment of title or claiming adverse possession, held insufficient to support decree pro confesso for complainant and final decree thereon. Smith v. Deas, 158 Miss. 111, 130 So. 105, 1930 Miss. LEXIS 25 (Miss. 1930).

An allegation that complainant's ancestor was at the time of his death seized and possessed in fee simple is merely a legal conclusion and a statement of constructive and not of actual possession. Jones v. Rogers, 85 Miss. 802, 38 So. 742, 1904 Miss. LEXIS 106 (Miss. 1904), overruled, Kennedy v. Sanders, 90 Miss. 524, 43 So. 913, 1907 Miss. LEXIS 92 (Miss. 1907), writ of error dismissed, 214 U.S. 196, 29 S. Ct. 635, 53 L. Ed. 965, 1909 U.S. LEXIS 1908 (U.S. 1909).

It is not necessary to set out particularly defendant's title, which it is sought to cancel. Wright v. Lauderdale County, 71

Miss. 800, 15 So. 116, 1894 Miss. LEXIS 44 (Miss. 1894).

A bill alleging that plaintiff's father, as owner of land, sold it and gave plaintiff the purchase-money notes, that she sued on them and recovered judgment, that the land was sold under execution to her, and that the debtor surrendered possession to her, sets up such an equitable title in plaintiff as entitles her to sue to remove a cloud on the title. Williamson v. Louisville, N. O. & T. R. Co., 6 So. 205 (Miss. 1889).

The allegation that complainant is the true and equitable owner by purchase from one whose title is not set out is insufficient. Harrill v. Robinson, 61 Miss. 153, 1883 Miss. LEXIS 91 (Miss. 1883).

If the object be to cancel a particular evidence of title possessed by defendant, it should be as fully described as known to the pleader. Cook v. Friley, 61 Miss. 1, 1883 Miss. LEXIS 58 (Miss. 1883).

8. Evidence.

Church, claiming under prior recorded deed which properly described the land therein by metes and bounds although reference to total acreage was erroneous, was entitled to have its title quieted thereto as against defendants claiming under a subsequent conveyance of the remainder of the quarter section from the same grantor, since defendants acquired no semblance or color of title to the church's realty under the latter conveyance, and their plea of adverse possession was not sustained by proof that they claimed some of the land and that each of them pastured a cow thereon for as long as ten consecutive years. Miles v. Collinsville Methodist Church, 46 So. 2d 110 (Miss. 1950).

Deed of purchaser at tax sale for unpaid taxes was not sustained in suit to quiet title where owner introduced into evidence duplicate receipt issued pursuant to Hemingway's Code, 1927, § 8241, showing owner paid taxes, and where owner orally testified that he paid the taxes and such testimony was uncontradicted. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950).

In suit to quiet title, when phrase in restrictive covenant is shown by expert witnesses to be ambiguous, situation justifies resort to further aid of construction, that of negotiations and conversations leading up to adoption of restrictive covenant. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

In suit to quiet title to land in which decree involves meaning of restriction in deed against operation on property of textile industry, decree for neither side can rest on testimony of experts in textile trade as to meaning of term "textile industry" when their own disagreement and divergence of understanding of its significance make manifest that phrase is ambiguous and not solvable by uniform trade understanding. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

Where grantors of deed remained in possession on the theory that it was intended to be a mortgage, they had the right to show by parol that it was so intended. McGehee v. Weeks, 112 Miss. 483, 73 So. 287, 1916 Miss. LEXIS 132 (Miss. 1916).

Where the bill calls for a discovery of defendant's title, an unsworn answer setting up a tax title is not evidence thereof. What effect a sworn answer would have, not decided. National Bank of Republic v. Louisville, N. O. & T. R. Co., 72 Miss. 447, 17 So. 7, 1894 Miss. LEXIS 125 (Miss. 1894).

9. Burden of proof.

Former wife is entitled to equitable lien against realty title to which is in former husband where wife satisfies burden of proof with respect to misrepresentation by showing that husband executed deed to wife and caused photocopy of deed to be imprinted with notary seal and taken to home, that wife came into possession of photocopy of deed, that wife helped pay for land, and that wife will suffer detriment if her claim to title is defeated. Chapman v. Chapman, 473 So. 2d 467, 1985 Miss. LEXIS 2175 (Miss. 1985).

Oil company seeking to remove as cloud on leasehold interest lease held by another lessee covering same property has burden of proving that oil well on property in question continued as producing well or that reworking operations were begun within time prescribed by lease, if production ceased, and that production was again achieved and continued keeping leases in force and effect. Culbertson v. Dixie Oil Co., 467 So. 2d 952, 1985 Miss. LEXIS 2041 (Miss. 1985).

Purchaser at tax sale who seeks to have tax title quieted and confirmed has burden of proving valid assessment of land for taxes and that taxes for which land was offered for sale had not been paid. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477, 1950 Miss. LEXIS 256 (Miss. 1950).

In an action by the record owner of land to remove defendant's claim thereto as a cloud upon its title, wherein defendant by cross-bill asserted title to the land by adverse possession, the burden was upon the defendant to show that he was vested with title by adverse possession to the disputed area, and to do so it was necessary for him to show that he alone, or he and his predecessors in title together, had had actual, open, hostile, peaceable, exclusive, continuous possession of the land for ten years, under claim of ownership thereto. Southern Naval Stores Co. v. Price, 202 Miss. 116, 30 So. 2d 505, 1947 Miss. LEXIS 248 (Miss. 1947).

Complainant in bill to remove clouds and establish title to land has burden of showing perfect title in himself. Nicholson v. Myres, 170 Miss. 441, 154 So. 282, 1934 Miss. LEXIS 106 (Miss. 1934).

10. Relief granted.

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085, 2009 Miss. App. LEXIS 102 (Miss. Ct. App. 2009).

Former wife is entitled to equitable lien against realty title to which is in former husband where wife satisfies burden of proof with respect to misrepresentation by showing that husband executed deed to wife and caused photocopy of deed to be imprinted with notary seal and taken to home, that wife came into possession of photocopy of deed, that wife helped pay for land, and that wife will suffer detriment if her claim to title is defeated. Chapman v. Chapman, 473 So. 2d 467, 1985 Miss. LEXIS 2175 (Miss. 1985).

In suit to cancel tax title, affirmative relief declaring tax title to be valid could not be granted in absence of cross-bill. Webb v. Anderson, 206 Miss. 398, 40 So. 2d 189, 1949 Miss. LEXIS 270 (Miss. 1949).

Entry of possession by defendants under tax patent from state, with actual knowledge of former owner and continuance in possession for more than two years, with payment of taxes, established adverse possession against former owner, barring suit to cancel the tax sale to the state and patent from the state as clouds upon plaintiffs' title. Webb v. Anderson, 206 Miss. 398, 40 So. 2d 189, 1949 Miss. LEXIS 270 (Miss. 1949).

Purchase of property at tax sale, which property was assessed according to a plat prepared by the owners showing abutting alleys and paths needed for access thereto but otherwise of no appreciable value, carried with it full and unrestricted right of ingress and egress over such approaches. Evans v. Jackson, 201 Miss. 14, 28 So. 2d 249, 1946 Miss. LEXIS 353 (Miss. 1946).

Husband who has instituted suit against former wife to cancel her claim to property as a cloud upon his title is not entitled to relief where he has not offered to do full equity toward the wife. Peeler v. Peeler, 199 Miss. 492, 24 So. 2d 338, 1946 Miss. LEXIS 219 (Miss.), cert. denied, 329 U.S. 720, 67 S. Ct. 54, 91 L. Ed. 624, 1946 U.S. LEXIS 1976 (U.S. 1946).

Deed in consideration for support of grantor not cancelled for failure to support, where it contains no provision for forfeiture and reserves no lien to secure performance. Wynn v. Kendall, 122 Miss. 809, 85 So. 85, 1920 Miss. LEXIS 477 (Miss. 1920).

Deed in fee simple to defendant, purchasing under foreclosure of trust deed on life estate, should be cancelled after death of life tenant as a cloud on title of remaindermen. Leflore v. Flowers, 117 Miss. 682, 78 So. 513 (Miss. 1918).

11. Judgment or decree.

In suit to quiet title, decree of chancellor that covenant in deed prohibiting use of property for any type of textile industry did not prohibit use of described property as place to manufacture garments or other similar articles of wearing apparel, given on conflicting evidence equally balanced, or nearly so, will be affirmed on appeal to Supreme Court. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

Any judgment adjudging plaintiff in an action under this section [Code 1942, § 1324] to be the owner of the land as against one claiming by adverse possession thereto is not binding as against the claim of a third person not made a party to the suit who might have acquired a good and perfect title against plaintiff by ten years adverse possession under § 711, Code 1942. Southern Naval Stores Co. v. Price, 202 Miss. 116, 30 So. 2d 505, 1947 Miss. LEXIS 248 (Miss. 1947).

In a suit to hold invalid and set aside a tax sale to the state and a patent from the state to a municipality, the chancellor was correct in decreeing that the patent to the municipality vested in it all right, title and interest of the owner of record and his predecessors in title, where the evidence supported chancellor's finding that the land was not being used exclusively for burial purposes when assessed and sold for taxes and that it was subject to assessment and sale therefor. Evans v. Jackson, 201 Miss. 14, 28 So. 2d 249, 1946 Miss. LEXIS 353 (Miss. 1946).

False allegation that there is no adverse possession is a fraud on the court and decree confirming title is void as to a defendant in adverse possession where complainant does not proceed under this section (Code 1906, § 550) to have such adverse claim cancelled. Brooks-Scanlon Co. v. Stogner, 114 Miss. 736, 75 So. 596, 1917 Miss. LEXIS 92 (Miss. 1917).

Suit to cancel decree confirming title for fraud is not a collateral attack. Brooks-Scanlon Co. v. Stogner, 114 Miss. 736, 75 So. 596, 1917 Miss. LEXIS 92 (Miss. 1917).

12. Injunction in aid of remedy.

Equity will enjoin a sale of real estate under legal process, where the only effect of the sale would be to cast a cloud upon complainant's title. Irwin v. Lewis, 50 Miss. 363, 1874 Miss. LEXIS 67 (Miss. 1874).

13. Res adjudicata.

Complainant's title having been put in issue, a decree dismissing his bill, though for defect of proof, bars a subsequent suit. Chiles v. Champenois, 69 Miss. 603, 13 So. 840, 1891 Miss. LEXIS 167 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Decree or judgment subject to direct attack in chain of title as rendering title unmerchantable. 9 A.L.R.2d 710.

Necessary or proper parties to suit or proceeding to establish private boundary line. 73 A.L.R.3d 948.

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

20A Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 25.1 (Complaint, petition, or declaration-To remove cloud on title-To enjoin construction of edifice until boundary dispute determined).

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Forms 1-115 (Proceedings to quiet title and to determine adverse claims to property).

CJS.

74 C.J.S., Quieting Title §§ 1-97.

§ 11-17-33. Receiver appointed for nonresident or unknown owners of mineral interests.

(1) To encourage the exploration and development of the state's mineral resources, upon application, accompanied by sworn affidavit, of one or more persons, firms or corporations claiming or owning any mineral interest in a tract of land and upon which mineral production is desired, the chancery court of the county in which the land, or any part thereof, is located shall have the authority to appoint the chancery clerk as receiver of any mineral interest claimed or owned by any person, or persons, whose whereabouts or identity is unknown, if the court is satisfied after hearing and proof that the said person, or persons, could not be found after diligent search and inquiry and that petitioners will suffer loss, damage or injury unless such receiver is appointed.

(2) Such receiver shall have power and authority, under court order, to execute and deliver to a lessee, determined by the court, a mineral lease on any such outstanding mineral interest, upon such terms and conditions as may be prescribed by the court; provided, however, that the court affirmatively find that the lease taken as a whole shall be at least as favorable to the absent person as other leases in the same tract of land and shall be in the best interest of all parties. It shall be conclusively presumed in every court in this state that the terms and conditions of said lease are reasonable, fair and represent the fair market value of the interests leased. The moneys, if any, paid to such receiver for execution, delay rentals, royalties or any other proceeds of such lease shall be paid immediately upon accrual to the receiver and shall be impounded by said receiver for the use and benefit of such person. The receiver shall hold, preserve and invest any such money so received in the same manner as other moneys held by the chancery clerk and on order of the court shall pay any money so held, with any interest accrued less costs of the receivership, to any person holding a valid claim thereto when said claim is asserted within ten (10) years of the date of the decree establishing the receivership. The official bond of the chancery clerk shall cover any money paid him as such receiver and the chancellor may prescribe such additional bond as he may think proper.

(3) No receiver shall be appointed under the provisions of this section unless all interested parties who are not parties to the petition shall be made defendants and all such defendants shall have been served with process of the court provided by law for cases in chancery court. The summons by publication shall be substantially in the following form:

"THE STATE OF MISSISSIPPI
________ (inserting names of defendants)
You are summoned to appear before the Chancery Court of the County of ________ in said state, on the ________ Monday of ________, A.D. ________, to defend the suit of ________ (et al.) praying the appointment of a receiver of an undivided mineral interest claimed to be owned by you in and under ________ (here describe the land) wherein you are a defendant. This the ________ day of ________, A.D.

Clerk"

(4) The costs of the action for appointment of the receiver shall be taxed against the petitioners if they fail to prove their case.

(5) The receivership, once established, shall continue, unless dissolved by the court for good cause, for a period of at least ten (10) years.

(6) This section shall not alter or change any laws now in effect relating to suits for the removal of clouds upon title or the appointment of receivers under any other law, but is cumulative thereof.

(7) The term "tract of land" as used herein shall not be limited to property wherein petitioner owns an undivided interest; but may include any geographic boundary upon which mineral exploration and/or production may be conducted even though the tract may include property in which petitioner has no property interest or any other geographic boundary the court, in its discretion, may deem appropriate.

HISTORY: Codes, 1942, § 1324.5; Laws, 1950, ch. 340, §§ 1-5; Laws, 1980, ch. 412, § 1, eff from and after July 1, 1980.

Cross References — Appointment or removal of receivers in vacation, see § 11-5-151.

Receivers, generally, see § 11-5-153 et seq.

Disposition of proceeds held by receiver, see § 11-17-34.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.

1 Am. Jur. 2d, Absentees §§ 1- 14.

65 Am. Jur. 2d, Receivers § 12.

21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Form 81 (Order appointing receiver on motion of party).

CJS.

75 C.J.S., Receivers §§ 10–17.

§ 11-17-34. Disposition of mineral lease proceeds held by receiver.

Unless otherwise released by the court, the receiver appointed in Section 11-17-33 shall hold all net proceeds paid in connection with such lease for a period of ten (10) years from the date of the decree establishing the receivership. If, at the end of that period of ten (10) years, no valid claim has been made for such moneys and said mineral interests, all moneys and mineral interests held by the receiver shall immediately escheat to the state in the same manner as if the absent person had died intestate leaving no heirs capable of inheriting as set forth in Chapter 11, Title 89, Mississippi Code of 1972. Provided, however, any person who is not concluded as a party or privy by a decree in favor of the state in proceedings to establish an escheat, may recover of the state, by suit, the net proceeds derived from any lease and from the sale of such minerals and paid into the state treasury, if the party shall establish his right to such minerals and that the same had not properly escheated to the state; but the title of the purchaser of such minerals shall not be thereby disturbed.

HISTORY: Laws, 1980, ch. 412, § 2, eff from and after July 1, 1980.

Cross References — When property escheats to state, see § 89-11-1.
Proceedings to establish escheats, see § 89-11-5 et seq.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR.

Uniform Disposition of Unclaimed Property Act. 98 A.L.R.2d 304.

Am. Jur.

1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property §§ 5- 30, 35— 39— 58 et seq.

27A Am. Jur. 2d, Escheat §§ 1-12, 30 et seq.

9 Am. Jur. Pl & Pr Forms (Rev) Escheat, Forms 1 et seq. (Proceedings to enforce escheat).

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 21 et seq. (Recovery, restoration or reimbursement).

§ 11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.

In bills to confirm title to real estate, and to cancel and remove clouds therefrom, the complainant must set forth in plain and concise language the deraignment of his title. If title has passed out of the sovereign more than seventy-five (75) years prior to the filing of the bill, then the deraignment shall be sufficient if it show title out of the sovereign and a deraignment of title for not less than sixty (60) years prior to the filing of the bill. A mere statement therein that complainant is the real owner of the land shall be insufficient, unless good and valid reason be given why he does not deraign his title. In all such cases, final decrees in the complainant's favor shall be recorded in the record of deeds, and shall be indexed as if a conveyance of the land from the defendant or each of them, if more than one, to the complainant or complainants, if more than one.

HISTORY: Codes, 1892, § 501; 1906, § 551; Hemingway's 1917, § 308; 1930, § 405; 1942, § 1325; Laws, 1962, ch. 285.

Cross References — Requirement of recordable conveyance of land, see § 89-3-1 et seq.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. Necessity of deraigning title.
3. Sufficiency of showing.
4. Presumptions and burden of proof.
5. Decree.

1. Jurisdiction.

The Chancellor's decision enforcing settlement between landowners was affirmed because defendant granted her attorney actual authority to settle lawsuit and she did not terminate attorney-client relationship until after the settlement. Fortenberry v. Parker, 754 So. 2d 561, 2000 Miss. App. LEXIS 6 (Miss. Ct. App. 2000).

Jurisdiction respecting conclusive adjudication of land titles rests alone with circuit and chancery courts, and to limited extent with county courts. Vansant v. Dodds, 164 Miss. 787, 144 So. 688, 1932 Miss. LEXIS 254 (Miss. 1932).

2. Necessity of deraigning title.

Even if it were true that a chancellor erred in excluding deeds from a property owner's predecessors in a boundary line dispute case, the error was harmless because the deeds were not relevant as the chancellor ultimately relied on a survey. Mize v. Westbrook Constr. Co. of Oxford, LLC, 146 So. 3d 352, 2013 Miss. App. LEXIS 432 (Miss. Ct. App. 2013), rev'd, in part, 146 So. 3d 344, 2014 Miss. LEXIS 443 (Miss. 2014).

In an action to remove cloud on title, a plaintiff has the burden of showing perfect title and cannot rely on the weaknesses of a defendant's title. Williams v. King, 860 So. 2d 847, 2003 Miss. App. LEXIS 1136 (Miss. Ct. App. 2003).

Judgment was properly awarded to plaintiffs in their suit against defendants for encroachment on their property where nothing in defendants' motion for a new trial indicated that the chancery court erred in not requiring a deraignment of title, or in ruling the way it did in the absence of a deraignment of title; no Miss. R. Civ. P. 12(e) motion was ever filed to request that plaintiffs deraign their title. Crosswhite v. Golmon, 939 So. 2d 831, 2006 Miss. App. LEXIS 738 (Miss. Ct. App. 2006).

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by this section [Code 1942, § 1325] or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title from the common source to the necessary parties to the suit, and his bill did not allege that he had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. Warren v. Clark, 230 Miss. 873, 94 So. 2d 323, 1957 Miss. LEXIS 435 (Miss. 1957).

In a suit to remove clouds on his title, where the complainant relies upon adverse possession for his title, it is not necessary to deraign record title to land. Cochran v. Cochran, 221 Miss. 780, 74 So. 2d 841, 1954 Miss. LEXIS 593 (Miss. 1954).

Deraignment of title is required only in bills to conform title to real estate and to cancel and remove clouds therefrom, and where a bill is brought to cancel a deed the demurrer was overruled. Martin v. Adams, 216 Miss. 270, 62 So. 2d 328, 1953 Miss. LEXIS 633 (Miss. 1953).

Requirement that bill for cancellation of title set out deraignment of title is made mandatory by this section [Code 1942, § 1325]. Smith v. Overstreet, 205 Miss. 488, 38 So. 2d 923, 1949 Miss. LEXIS 445 (Miss. 1949).

Bill for cancellation of title must meet requirements of this section [Code 1942, § 1325] by setting out deraignment of title, and it does not state case against defendants unless deraignment is sufficient, since complainant must depend upon strength of his own title and not weakness of that of his adversary. Smith v. Overstreet, 205 Miss. 488, 38 So. 2d 923, 1949 Miss. LEXIS 445 (Miss. 1949).

Chancellor is correct in sustaining special demurrer to bill for cancellation of title for failure to deraign title and, upon complainants' refusal to amend, in dismissing bill, when the bill contains no deraignment or good and valid reason given for its absence, in accordance with this section [Code 1942, § 1325]. Smith v. Overstreet, 205 Miss. 488, 38 So. 2d 923, 1949 Miss. LEXIS 445 (Miss. 1949).

Complainant must deraign title or give reason for not doing so. Longmire v. Mars, 124 Miss. 77, 86 So. 753, 1920 Miss. LEXIS 498 (Miss. 1920).

Remaindermen cannot bring suit to cancel foreclosure sale under deed of trust of a life estate prior to the death of the original life tenants. Leflore v. Flowers, 118 Miss. 75, 79 So. 60, 1918 Miss. LEXIS 53 (Miss. 1918).

In suit to confirm title or remove clouds complainant must deraign title. Russell v. Hickory, 116 Miss. 46, 76 So. 825, 1917 Miss. LEXIS 293 (Miss. 1917).

Plaintiff in suit to confirm title must plead and prove perfect title in himself. Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619, 1917 Miss. LEXIS 146 (Miss. 1917).

Complainant seeking to cancel contracts for sale of timber land must deraign title in himself. Eastman v. Wyatt Lumber Co., 102 Miss. 313, 59 So. 93, 1912 Miss. LEXIS 60 (Miss. 1912).

Complainants seeking to redeem land from tax sale to their ancestors need not prove title in her, she being the common source of title of the parties. Westerfield v. Merchant, 93 Miss. 791, 47 So. 434, 1908 Miss. LEXIS 139 (Miss. 1908).

Complainant must show either (a) Title in himself from the government down, or (b) Title in himself by adverse possession, or (c) Title in himself from the defendant, or (d) That the parties to the suit claim under a common source, the complainant having the better title from that source. Long v. Stanley, 79 Miss. 298, 30 So. 823, 1901 Miss. LEXIS 81 (Miss. 1901); Smith v. Overstreet, 205 Miss. 488, 38 So. 2d 923, 1949 Miss. LEXIS 445 (Miss. 1949).

Complainant must show either (a) Title in himself from the government down, or (b) Title in himself by adverse possession, or (c) Title in himself from the defendant, or (d) That the parties to the suit claim under a common source, the complainant having the better title from that source. Long v. Stanley, 79 Miss. 298, 30 So. 823, 1901 Miss. LEXIS 81 (Miss. 1901); Smith v. Overstreet, 205 Miss. 488, 38 So. 2d 923, 1949 Miss. LEXIS 445 (Miss. 1949).

He must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover against the defendant in an action of ejectment. Chiles v. Gallagher, 67 Miss. 413, 7 So. 208, 1889 Miss. LEXIS 36 (Miss. 1889).

3. Sufficiency of showing.

Chancery court properly partitioned the property at issue because accommodations appeared to have been made for the fair distribution of property between the three partited owners and the remaining cotenants, there was substantial evidence in the record to justify the chancellor's division of the property, the complaint explained the interests devised in the will, the calculations, which were not in dispute, showed every descendant and devisee received their fair portion of the property according to the decedent's will and the laws of intestate succession, and the statutory requirement of proof of title was fulfilled. Kohnke v. Tate, 270 So. 3d 1076, 2018 Miss. App. LEXIS 499 (Miss. Ct. App. 2018).

In an action to confirm title to a parcel of land in the city of Biloxi, the trial court erred in not confirming title in the city where, in a prior eminent domain proceeding, the judgment revealed an adequate description by monuments of the entire parcel in question although there was a discrepancy in the distances set forth in the judgment. Biloxi Development Com. v. Frey, 401 So. 2d 716, 1981 Miss. LEXIS 2054 (Miss. 1981).

A bill of complaint in a proceeding requiring deraignment of title does not state a case against defendants thereto unless the deraignment be sufficient, since complainant must depend upon the strength of his own title and not the weakness of that of his adversary. Dorsey v. Sullivan, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

Bill for confirmation of title which merely stated that the land was derived from a common source who "owned" the land was not sufficient in a deraignment, and the bill was demurrable for failure to show facts of the common source's title. Dorsey v. Sullivan, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

Either plaintiff or interveners, claiming title to plaintiff's undivided interest in oil land by reason of quitclaim deed from plaintiff, subject to plaintiff's right to receive payment for oil produced from the land, were proper parties to maintain action to confirm title to such land and to set aside colessor's agreement executed by plaintiff. White v. Union Producing Co., 140 F.2d 176, 1944 U.S. App. LEXIS 3896 (5th Cir. 1944).

In suit to confirm tax title, bill alleging that title passed from Government by recorded patent to person against whom lands were assessed for taxes and that land was sold for unpaid taxes and tax deed was issued, filed, and acknowledged held sufficient to show deraignment of title. Salter v. Polk, 172 Miss. 263, 159 So. 855, 1935 Miss. LEXIS 138 (Miss. 1935).

In suit to confirm title or remove clouds general averment that complainant is real owner not sufficient. Russell v. Hickory, 116 Miss. 46, 76 So. 825, 1917 Miss. LEXIS 293 (Miss. 1917).

Bill to quiet title is demurrable if it fails to show facts as to validity of defendant's title, or the interest of any of the parties in the land, or when decedent died or how any of the parties is heir to him. Thames v. Duvic, 89 Miss. 9, 42 So. 667, 1906 Miss. LEXIS 70 (Miss. 1906).

A mere statement in a bill that complainant is the real owner of the land is insufficient unless good and valid reason be given for the failure to deraign his title. Jackson v. Port Gibson Bank, 85 Miss. 645, 38 So. 35, 1904 Miss. LEXIS 179 (Miss. 1904).

4. Presumptions and burden of proof.

The presumption that land has been granted to the possessor by the state arises where there is some unexplained anomaly in the chain of title; however, this principle should not be construed to mean that the presumption arises only in the face of such an anomaly. The open and continuous possession of property by the claimants and their predecessors in title from 1892 to the present, together with the usual acts incident to ownership, were sufficient to raise the presumption of a grant. Board of Trustees v. Rye, 521 So. 2d 900, 1988 Miss. LEXIS 61 (Miss. 1988), limited, Bd. of Educ. v. Warner, 853 So. 2d 1159, 2003 Miss. LEXIS 311 (Miss. 2003).

Complainant has burden of showing perfect title in himself to maintain bill to remove clouds and establish his title to land. Nicholson v. Myres, 170 Miss. 441, 154 So. 282, 1934 Miss. LEXIS 106 (Miss. 1934).

In suit to confirm title where complainant proves possession for fifty years and a perfect chain of title back to an uncle of the original patentee, presumption arises of a lost deed from patentee to uncle. Scarborough v. Native Lumber Co., 118 Miss. 138, 79 So. 84, 1918 Miss. LEXIS 64 (Miss. 1918).

5. Decree.

Bill to quiet title, not alleging deraignment of title or claiming adverse possession, held insufficient to support decree pro confesso for complainant and final decree thereon. Smith v. Deas, 158 Miss. 111, 130 So. 105, 1930 Miss. LEXIS 25 (Miss. 1930).

In suit to confirm tax sale, if complainant fails to show title in himself from the government down, decree pro confesso not authorized; unauthorized decree pro confesso may be set aside. Lyon Co. v. Ratliff, 129 Miss. 342, 92 So. 229, 1922 Miss. LEXIS 49 (Miss. 1922).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 33, 57.

CJS.

74 C.J.S., Quieting Title §§ 35-48, 71, 80, 81.

§ 11-17-37. Decrees as to possession, rents, etc.

In suits to try title, to cancel deeds and other clouds upon title, and to confirm title to real estate, the chancery court shall have jurisdiction to decree possession and to displace possession, to decree rents and compensation for improvements and taxes. In all cases where said courts heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

HISTORY: Codes, 1892, § 502; 1906, § 552; Hemingway's 1917, § 309; 1930, § 406; 1942, § 1326.

Cross References — Constitutional jurisdiction to decree possession and rents of real estate, see Miss. Const. Art. 6, § 160.

Procedure for attachment or distress for rent, see § 89-7-55 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action for cancellation of an instrument conveying real estate, the fact that the affected land was in another state may make the law of that state controlling but did not, of itself, defeat the subject matter jurisdiction of the Mississippi courts. Anderson v. Sonat Exploration Co., 523 So. 2d 1024, 1988 Miss. LEXIS 193 (Miss. 1988).

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. Kountouris v. Varvaris, 476 So. 2d 599, 1985 Miss. LEXIS 2245 (Miss. 1985).

Where plaintiff in ejectment suit made the same allegations as those made in a prior suit for confirmation of title, except the allegation as to confirmation of title, decision in confirmation suit sustaining general demurrer for failure of complainant to show title in himself was res judicata in ejectment suit. Williams v. Patterson, 203 Miss. 865, 34 So. 2d 366, 1948 Miss. LEXIS 331 (Miss. 1948).

Decree of chancery court confirming title and possession of mortgagee to realty which mortgagee bought upon foreclosure of trust deed held not res judicata of action of unlawful entry and detainer instituted by mortgagee, where rents and compensation for improvements were sought in such action but were not sought in chancery proceeding. Lion Oil Refining Co. v. Crystal Oil Co., 171 Miss. 36, 156 So. 593, 1934 Miss. LEXIS 190 (Miss. 1934).

Where specific performance was denied purchaser who defaulted, court properly awarded purchaser sum for permanent and valuable improvements made in good faith. Swalm v. Gill, 151 Miss. 630, 118 So. 446, 1928 Miss. LEXIS 346 (Miss. 1928).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims § 57.

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 13 (Judgment or decree quieting title and ordering issuance of writ of possession).

20A Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 25.1 (Complaint, petition, or declaration – To remove cloud on title – To enjoin construction of edifice until boundary dispute determined).

CJS.

74 C.J.S., Quieting Title §§ 71, 80, 81.

CHAPTER 19.

EJECTMENT

Sec.

11-19-1. In what case the action lies.
11-19-3. Power of courts over proceedings.
11-19-5. Who may be made defendants.
11-19-7. Repealed.
11-19-9. Landlord notified and admitted to defend.
11-19-11. Reversioner or remainderman admitted to defend.
11-19-13. Default of tenant for life not to prejudice.
11-19-15. Declaration.
11-19-17. Repealed.
11-19-19. Answer and defense.
11-19-21. Pleading amended as to description of premises.
11-19-23. Forms of proceedings.
11-19-25. Form of declaration.
11-19-27 through 11-19-51. Repealed.
11-19-53. Right to discover details of claim or title to premises.
11-19-55. Either party may have a survey made.
11-19-57. Action not abated by death.
11-19-59 through 11-19-79. Repealed.
11-19-81. When title of plaintiff has expired.
11-19-83. Repealed.
11-19-85. Trial of action between cotenants.
11-19-87. When a crop is growing on the land.
11-19-89. Proceedings as to crop upon affirmance of judgment in Supreme Court.
11-19-91. Judgment on the bond in proceedings involving crop.
11-19-93. Exceptions to insufficient bond.
11-19-95. Mesne profits and compensation for improvements.
11-19-97. How improvements estimated and judgment therefor.
11-19-99. How proceeds divided in case of sale.
11-19-101. Reversioner or remainderman to have appeal.
11-19-103. Judgment as res adjudicata.
11-19-105. Record may be recorded as a deed.

§ 11-19-1. In what case the action lies.

A civil action seeking ejectment as relief may be maintained in all cases where the plaintiff is legally entitled to the possession of the land sued for and demanded.

HISTORY: Codes, 1892, § 1626; 1906, § 1801; Hemingway's 1917, § 1434; 1930, § 1427; 1942, § 778; Laws, 1991, ch. 573, § 36, eff from and after July 1, 1991.

Cross References — Actions for unlawful entry and detainer, see § 11-25-1 et seq.
Limitation of actions to recover land, see § 15-1-7.
Action by board of supervisors to recover sixteenth sections or lieu lands, see § 29-3-85.
Action against tenant holding over, see § 89-7-27 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Equitable defenses.
3. Actions against railroads.

1. Generally.

Plaintiff, who introduced a certificate from the United States land office showing that he had entered lands involved, and also certificates showing cancellation and surrender of prior entry under which defendants claimed, could maintain ejectment. Gilleylen v. Isbel, 119 Miss. 566, 81 So. 161, 1919 Miss. LEXIS 24 (Miss. 1919).

Where plaintiffs claimed as heirs and defendants claimed under a sale by the administrator of plaintiffs' ancestor, it was error not to adjudge plaintiffs entitled to the homestead, especially excepted from the sale through which defendants claimed. Shannon v. Summers, 50 So. 693 (Miss. 1909).

Possession of land for ten years gives the possessor and those claiming under him a sufficient title to recover in ejectment against a mere intruder who has no title. Anderson v. Moore, 84 Miss. 400, 36 So. 520, 1904 Miss. LEXIS 54 (Miss. 1904).

The owner of the legal title to a strip of land may maintain ejectment therefor against defendant's exercising exclusive possession thereof, although the latter have a right of way over the same. Lott v. Payne, 82 Miss. 218, 33 So. 948, 1903 Miss. LEXIS 121 (Miss. 1903).

A deed to a strip of land limiting the grantee's interest to "a private easement or for street purpose only," does not authorize the grantee to take exclusive possession of the land. Lott v. Payne, 82 Miss. 218, 33 So. 948, 1903 Miss. LEXIS 121 (Miss. 1903).

A plaintiff in ejectment who shows a perfect legal title in herself is entitled to recover, although she may have described herself in the declaration as administratrix of the estate and guardian of the heirs of the decedent. Richardson v. Biglane, 81 Miss. 676, 33 So. 650, 1902 Miss. LEXIS 202 (Miss. 1902).

The vendee in a deed from a husband living with his wife, which she did not sign, purporting to convey his homestead, cannot maintain ejectment for the lands after the death of the husband against those who claim under his heirs. Johnson v. Hunt, 79 Miss. 639, 31 So. 205, 1901 Miss. LEXIS 100 (Miss. 1901).

Ejectment does not lie for land taken for levee purposes by the board of levee commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking. Owens v. Yazoo-Mississippi Delta Levee Board, 74 Miss. 269, 21 So. 12, 1896 Miss. LEXIS 143 (Miss. 1896).

2. Equitable defenses.

Where a plaintiff in ejectment suit made the same allegations as to right of possession as those made in prior suit for confirmation of title, which was adjudicated against him for failure to show title in himself, decision in confirmation suit was res judicata in ejectment suit. Williams v. Patterson, 203 Miss. 865, 34 So. 2d 366, 1948 Miss. LEXIS 331 (Miss. 1948).

This section [Code 1942, § 778] does not preclude an equitable defense to an action in ejectment; consequently, a lease, if conceded to be void as a lease, could operate as a valid contract to lease as a defense to an ejectment. Hytken v. Bianca, 186 Miss. 323, 186 So. 624, 188 So. 311, 1939 Miss. LEXIS 199 (Miss. 1939).

Where defendant disclaims as to part of land, failure to adjudge it to plaintiff is not error, in the absence of a request. Buie v. Cloy, 127 Miss. 719, 90 So. 446, 1921 Miss. LEXIS 275 (Miss. 1921).

A decree dismissing a bill to redeem an undivided interest in land from a tax sale, and for partition after redemption, does not estop the complainant from setting up the invalidity of the tax sale when sued in ejectment for the same land. Brothers v. Beck, 75 Miss. 482, 22 So. 944, 1897 Miss. LEXIS 126 (Miss. 1897).

Holding that in ejectment equitable defenses are inadmissible; hence it is not permissible for the defendant to show that, because of the circumstances under which the purchaser bought at tax sale, he was a trustee of the legal title for defendant and disqualified to purchase and hold against him. Morgan v. Blewett, 72 Miss. 903, 17 So. 601, 1895 Miss. LEXIS 21 (Miss. 1895).

3. Actions against railroads.

Ejectment will lie against a railroad company to recover land upon which it has wrongfully entered and constructed its track, but where the defendant acted in good faith the recovery will be limited to the land itself, with compensation for any use to which the premises might reasonably have been put by him and a sum to cover all damages done by the defendant. Illinois C. R. Co. v. Hoskins, 80 Miss. 730, 32 So. 150, 1902 Miss. LEXIS 301 (Miss. 1902).

A railroad track wrongfully constructed on land does not become a part of the freehold and upon ejection the railroad company has the right to remove the track, and this right applies as well to a short spur track as to a trunk line. Illinois C. R. Co. v. Hoskins, 80 Miss. 730, 32 So. 150, 1902 Miss. LEXIS 301 (Miss. 1902).

While ejectment can be maintained against a railroad company for the possession of its right of way, execution of such judgment should be stayed for reasonable time to enable the company to institute and prosecute a condemnation proceeding to acquire a right of way. Illinois C. R. Co. v. Le Blanc, 74 Miss. 650, 21 So. 760, 1897 Miss. LEXIS 57 (Miss. 1897).

RESEARCH REFERENCES

ALR.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Common source of title doctrine. 5 A.L.R.3d 375.

Validity, construction, and application of mobile home eviction statutes. 43 A.L.R.5th 705.

When is eviction of tenant by private landlord conducted "under color of state law" for purposes of 42 USCS § 1983. 73 A.L.R. Fed. 78.

Am. Jur.

25 Am. Jur. 2d, Ejectment §§ 1-2, 6 et seq.

CJS.

28A C.J.S., Ejectment §§ 1, 2 et seq.

§ 11-19-3. Power of courts over proceedings.

The court in which an action of ejectment may be brought or be pending may exercise over the proceedings therein the like jurisdiction and control as heretofore exercised in the action of ejectment, so as to insure a trial of the title only, and of actual ouster when necessary, and for all other purposes for which such jurisdiction was heretofore exercised.

HISTORY: Codes, 1857, ch. 55, art. 33; 1871, § 1570; 1880, § 2514; 1892, § 1627; 1906, § 1802; Hemingway's 1917, § 1435; 1930, § 1428; 1942, § 779.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Chancery Court is proper forum to hear ejectment proceeding in which sole defense is equitable defense of "fraudulent means." Hudson v. Bank of Edwards, 469 So. 2d 1234, 1985 Miss. LEXIS 2085 (Miss. 1985).

An owner, not made a party to and not having notice of an action in ejectment against a tenant of a tenant, is not affected by the judgment. Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827, 1908 Miss. LEXIS 250 (Miss. 1908).

A court of equity will enforce, and is the proper forum in which to assert, the rights of one who owns a house situated on the land of another. Decell v. McRee, 83 Miss. 423, 35 So. 940, 1903 Miss. LEXIS 60 (Miss. 1903).

In such case a judgment by default in an ejectment suit brought for the land by its owner against the owner of the house is not res adjudicata of the right of the defendant to remove the house, since the house is personal property. Decell v. McRee, 83 Miss. 423, 35 So. 940, 1903 Miss. LEXIS 60 (Miss. 1903).

§ 11-19-5. Who may be made defendants.

If the premises for which the action is brought be actually occupied by any person, such actual occupant shall be made a defendant in the suit; and all other persons claiming title or interest to or in the same may also, in all cases, be joined as defendants. If the premises be not occupied, the action shall be brought against some person exercising acts of ownership over the premises claimed, or claiming title thereto or some interest therein at the commencement of the suit.

HISTORY: Codes, 1892, § 1628; 1906, § 1803; Hemingway's 1917, § 1436; 1930, § 1429; 1942, § 780.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.
25 Am. Jur. 2d, Ejectment § 23.

CJS.
28A C.J.S., Ejectment §§ 70-76.

§ 11-19-7. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 1629; 1906, § 1804; Hemingway's 1917, § 1437; 1930, § 1430; 1942, § 781]

Editor's Notes — Former § 11-19-7 pertained to publication of the summons for a nonresident defendant.

§ 11-19-9. Landlord notified and admitted to defend.

Every tenant sued in a civil action seeking ejectment as relief shall forthwith give notice thereof to his landlord, under penalty of three (3) years' rent of the premises, to be recovered by the landlord or his representatives in a civil action. The landlord of such tenant, or any other proper person, shall, by leave of the court or judge, be admitted to appear and defend the action in all cases where the same would have been allowed heretofore, and either separately or jointly with the tenant. Any person admitted to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his answer that he defends as such landlord, and such person shall be allowed to set up any defense he has heretofore been allowed to set up, and no other. Any judgment in such action shall have the same effect for or against such person so admitted to defend as if he had been named in the complaint and regularly served with process.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 1 (85, 86); 1857, ch. 55, art. 4; 1871, § 1542; 1880, § 2482; 1892, § 1630; 1906, § 1805; Hemingway's 1917, § 1438; 1930, § 1431; 1942, § 782; Laws, 1991, ch. 573, § 37, eff from and after July 1, 1991.

Cross References — Relations between landlord and tenant, generally, see § 89-7-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

9 Am. Jur. P & P Forms (Rev), Ejectment, Forms 82 et seq. (Substituting landlord for tenant as defendant).

CJS.

28A C.J.S., Ejectment § 78.

§ 11-19-11. Reversioner or remainderman admitted to defend.

If a tenant for life or lives be impleaded concerning the land holden, the person to whom the reversion or remainder belongs may come into court at any time before judgment, and shall be admitted to defend his right.

HISTORY: Codes, 1880, § 2516; 1892, § 1631; 1906, § 1806; Hemingway's 1917, § 1439; 1930, § 1432; 1942, § 783.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-13. Default of tenant for life not to prejudice.

If a tenant for life or lives, when impleaded, make default or give up the tenement demanded, or if the judgment be given on such default or surrender, the person to whom the reversion or remainder belongs after the determination of the life estate, shall not be prejudiced or injured by such default, surrender, or judgment.

HISTORY: Codes, 1880, § 2517; 1892, § 1632; 1906, § 1807; Hemingway's 1917, § 1440; 1930, § 1433; 1942, § 784.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-15. Declaration.

The consent rule, and all fictions heretofore used in a civil action seeking ejectment as relief, are abolished; and the action shall be commenced by filing a complaint in the name of the person claiming the premises in question, as plaintiff against the defendant. The complaint shall describe the premises with such certainty as will distinctly apprise the defendant of their description and situation, and so that from such description possession may be delivered. If the plaintiff claim only an undivided interest therein, it shall state such interest. If the plaintiff claim more than he is entitled to, he may, nevertheless, recover so much as he shall prove title to.

HISTORY: Codes, 1857, ch. 55, art. 1; 1871, § 1539; 1880, § 2479; 1892, § 1633; 1906, § 1808; Hemingway's 1917, § 1441; 1930, § 1434; 1942, § 785; Laws, 1991, ch. 573, § 38, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If the declaration describe the land by numbers and the deeds offered in evidence describe it by metes and bounds, it is no objection, if the proof show it to be the same land. Lum v. Reed, 53 Miss. 73, 1876 Miss. LEXIS 38 (Miss. 1876).

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. 2d, Ejectment §§ 27 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Ejectment, Forms 1 et seq. (Complaint, petition or declaration).

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 84.1 (Stipulation of agreement – Tenant's consent to issuance and execution of warrant of eviction).

CJS.

28A C.J.S., Ejectment §§ 80, 81, 85 et seq.

§ 11-19-17. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 55, art. 2; 1871, § 1540; 1880, § 2480; 1892, § 1634; 1906, § 1809; Hemingway's 1917, § 1442; 1930, § 1435; 1942, § 786]

Editor's Notes — Former § 11-19-17 provided for the issuing of a summons on filing the declaration.

§ 11-19-19. Answer and defense.

The defendants, or any of them, shall be allowed to answer or otherwise defend the action, either jointly or separately. The answer, if the defendant do not admit the plaintiff's title, shall be "not guilty," which shall be filed within the like time as required in personal actions; and under said answer the defendant may give in evidence any lawful defense to the action not inconsistent with the other provisions of this chapter. Any defendant may defend for a part only of the premises in question; and in such case the part shall be described in the answer with the same certainty required in the complaint.

HISTORY: Codes, 1857, ch. 55, art. 3; 1871, § 1541; 1880, § 2481; 1892, § 1635; 1906, § 1810; Hemingway's 1917, § 1443; 1930, § 1436; 1942, § 787; Laws, 1991, ch. 573, § 39, eff from and after July 1, 1991.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Under "not guilty" the defendant cannot disprove his possession. A denial of possession must be specially pleaded. Bernard v. Elder, 50 Miss. 336, 1874 Miss. LEXIS 64 (Miss. 1874).

A plea setting up the statute of limitations is a nullity, that defense can be made under the general issue. Hutto v. Thornton, 44 Miss. 166, 1870 Miss. LEXIS 97 (Miss. 1870); Wilson v. Williams' Heirs, 52 Miss. 487, 1876 Miss. LEXIS 245 (Miss. 1876); Dean v. Tucker, 58 Miss. 487, 1880 Miss. LEXIS 148 (Miss. 1880).

RESEARCH REFERENCES

ALR.

Defense of adverse possession or statute of limitations as available under general denial or plea of general issue in ejectment action. 39 A.L.R.2d 1426.

Am. Jur.

25 Am. Jur. 2d, Ejectment §§ 31, 33, 34.

CJS.

28A C.J.S., Ejectment §§ 82, 95-109.

§ 11-19-21. Pleading amended as to description of premises.

If the premises be not described with sufficient certainty in the complaint or answer, the court or judge may order the pleading to be amended so as to contain a sufficient description. If either party fail to comply with such order, judgment may be entered as for want of a complaint or answer, according to the circumstances of the case.

HISTORY: Codes, 1857, ch. 55, art. 6; 1871, § 1544; 1880, § 2484; 1892, § 1636; 1906, § 1811; Hemingway's 1917, § 1444; 1930, § 1437; 1942, § 788; Laws, 1991, ch. 573, § 40, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. 2d, Ejectment §§ 28- 34.

CJS.

28A C.J.S., Ejectment §§ 86, 87, 114-116.

§ 11-19-23. Forms of proceedings.

Declarations, writs, and pleas in the form or to the effect of the precedents appended hereto, shall be good and sufficient for all purposes in proceedings under this chapter.

HISTORY: Codes, 1857, ch. 55, art. 35; 1871, § 1547; 1880, § 2487; 1892, § 1637; 1906, § 1812; Hemingway's 1917, § 1445; 1930, § 1438; 1942, § 789.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The extent to which rescission from the common law is conceded by this section [Code 1942, § 789] is limited to the prescribed forms. Burns v. Allen, 202 Miss. 240, 31 So. 2d 125, 1947 Miss. LEXIS 266 (Miss. 1947).

§ 11-19-25. Form of declaration.

"The State of Mississippi In the circuit court
________ term,
County of ________ A.D. ________

"A B, plaintiff, claims the right to possession of a tract of land, situated in ________ County, containing ________ acres, more or less, and being more particularly described as follows: (here insert legal description of premises); and that the defendant wrongfully deprives him of the possession thereof, for which damage in the amount of ________ Dollars are here demanded.

"E F, Attorney for Plaintiff."

If mesne profits be demanded, add to the above form the following:

"And the plaintiff also demands of the defendant the sum of ________ Dollars for the use and occupation of the said land by the defendant."

HISTORY: Codes, 1892, § 1638; 1906, § 1813; Hemingway's 1917, § 1446; 1930, § 1439; 1942, § 790; Laws, 1991, ch. 573, § 41, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Mesne profits up to the trial are recoverable in the action, and the demand for use and occupation is barred in six years-not three. Dean v. Tucker, 58 Miss. 487, 1880 Miss. LEXIS 148 (Miss. 1880).

§§ 11-19-27 through 11-19-51. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-19-27. [Codes, 1892, § 1639; 1906, § 1814; Hemingway's 1917, § 1447; 1930, § 1440; 1942, § 791]

§ 11-19-29. [Codes, 1892, § 1640; 1906, § 1815; Hemingway's 1917, § 1448; 1930, § 1441; 1942, § 792]

§ 11-19-31. [Codes, 1892, § 1641; 1906, § 1816; Hemingway's 1917, § 1449; 1930, § 1442; 1942, § 793]

§ 11-19-33. [Codes, 1892, § 1642; 1906, § 1817; Hemingway's 1917, § 1450; 1930, § 1443; 1942, § 794]

§ 11-19-35. [Codes, 1892, § 1643; 1906, § 1818; Hemingway's 1917, § 1451; 1930, § 1444; 1942, § 795]

§ 11-19-37. [Codes, 1892, § 1644; 1906, § 1819; Hemingway's 1917, § 1452; 1930, § 1445; 1942, § 796]

§ 11-19-39. [Codes, 1892, § 1645; 1906, § 1820; Hemingway's 1917, § 1453; 1930, § 1446; 1942, § 797]

§ 11-19-41. [Codes, 1857, ch. 55, art. 8; 1871, § 1546; 1880, § 2486; 1892, § 1646; 1906, § 1821; Hemingway's 1917, § 1454; 1930, § 1447; 1942, § 798]

§ 11-19-43. [Codes, 1857, ch. 55, art. 5; 1871, § 1543; 1880, § 2483; 1892, § 1647; 1906, § 1822; Hemingway's 1917, § 1455; 1930, § 1448; 1942, § 799]

§ 11-19-45. [Codes, 1857, ch. 55, art. 7; 1871, § 1545; 1880, § 2485; 1892, § 1648; 1906, § 1823; Hemingway's 1917, § 1456; 1930, § 1449; 1942, § 800]

§ 11-19-47. [Codes, 1857, ch. 55, art. 9; 1871, § 1548; 1880, § 2488; 1892, § 1649; 1906, § 1824; Hemingway's 1917, § 1457; 1930, § 1450; 1942, § 801]

§ 11-19-49. [Codes, 1857, ch. 55, art. 10; 1871, § 1549; 1880, § 2489; 1892, § 1650; 1906, § 1825; Hemingway's 1917, § 1458; 1930, § 1451; 1942, § 802]

§ 11-19-51. [Codes, 1857, ch. 55, art. 11; 1871, § 1550; 1880, § 2490; 1892, § 1651; 1906, § 1826; Hemingway's 1917, § 1459; 1930, § 1452; 1942, § 803]

Editor's Notes — Former § 11-19-27 was a form of summons.

Former § 11-19-29 was a form of plea by tenant defending for whole.

Former § 11-19-31 was a form of plea where tenant defends for part.

Former § 11-19-33 was a form of plea by landlord defending separately.

Former § 11-19-35 was a form of plea by any other than the landlord.

Former § 11-19-37 was a form of plea by landlord and tenant defending.

Former § 11-19-39 was a form of plea by other than landlord defending with the tenant.

Former § 11-19-41 pertained to denying possession by special plea.

Former § 11-19-43 provided that a plea of not guilty was an admission of possession.

Former § 11-19-45 pertained to judgments by default.

Former § 11-19-47 pertained to a judgment when the defense was limited to a part of the premises.

Former § 11-19-49 pertained to discontinuances.

Former § 11-19-51 pertained to the situation where one of several defendants retracts his plea and confesses the action.

§ 11-19-53. Right to discover details of claim or title to premises.

After issue joined in ejectment, either party may discover the details of the other's claim or title to the premises in question, and the response thereto shall include a short abstract of such documentary evidences of title as the party may intend to give in evidence on the trial, and a clear and succinct statement of the substance of any and all lost or destroyed documents the contents of which he may expect to prove. If title be claimed by inheritance, or if claimed on any fact which rests in parol, the facts shall be stated. In case of claim by inheritance, if either party demand it, the other shall give the ages of the several persons to whom the land descended, and the date of the death of the person from whom they inherited the premises. If any document referred to in the response to such discovery request made by law be recorded, it shall also state where it is recorded, or, if not recorded, then it shall include copies of such as are in the possession of the party, with the names of the subscribing witnesses thereto, if any. The discovery response shall be served within the time and in the manner prescribed by the Mississippi Rules of Civil Procedure and, in default thereof, evidence of such title shall not be given on the trial. In all cases, the evidence of title shall be confined to the matters contained in the discovery response.

HISTORY: Codes, 1857, ch. 55, art. 12; 1871, § 1551; 1880, § 2491; 1892, § 1652; 1906, § 1827; Hemingway's 1917, § 1460; 1930, § 1453; 1942, § 804; Laws, 1991, ch. 573, § 42, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Bill of particulars.

Where plaintiffs in ejectment in their bill of particulars deraign title by inheritance from their father, who, they claim, acquired title by adverse possession, they are confined to the title outlined, and may not recover by showing a different title by inheritance from their mother. Smith v. Whittington, 112 Miss. 759, 73 So. 785, 1916 Miss. LEXIS 170 (Miss. 1916).

Party rendering a bill of particulars not required to inform his adversary of evidence which he will introduce to show the invalidity of any deed or other source of title through which the adversary may claim. Mitchell v. Tubb, 107 Miss. 221, 65 So. 216, 1914 Miss. LEXIS 71 (Miss. 1914).

Plaintiff in ejectment who deduces a perfect title from common source need not prove title from the government. Richards v. Lee, 91 Miss. 657, 45 So. 570, 1907 Miss. LEXIS 184 (Miss. 1907).

Defendant in ejectment should not have been permitted to introduce any evidence on failure to furnish a bill of particulars after demand made on him in strict compliance with Code 1892, § 1652. W. C. Early & Co. v. Long, 89 Miss. 285, 42 So. 348, 1906 Miss. LEXIS 37 (Miss. 1906).

The statute expressly confines the parties in an action of ejectment, where they have filed such bills, to the evidence specified in their bills of particulars of title. Goforth v. Stingily, 79 Miss. 398, 30 So. 690, 1901 Miss. LEXIS 58 (Miss. 1901).

If the bills of particulars of the parties deraign title from a common source, plaintiff need not give evidence of title in that source, as the bill of particulars, when filed, is an admission of record that the party claims title as therein indicated. Gillum v. Case, 67 Miss. 588, 7 So. 551, 1890 Miss. LEXIS 131 (Miss. 1890).

2. —Amendment.

In ejectment it is not reversible error to deny plaintiff's application to amend his bill of particulars of title under this section [Code 1942, § 804], where the same was made after the jury was impaneled and after undue delay, without explaining the delay or submitting the amendment proposed to the court. Goforth v. Stingily, 79 Miss. 398, 30 So. 690, 1901 Miss. LEXIS 58 (Miss. 1901).

Where the defendant files his bill of particulars with the clerk, instead of delivering it to the plaintiff, and because thereof plaintiff objected to any evidence of title by defendant, it was not error to overrule such objection, if the court offered to continue the case if plaintiff were taken by surprise. A defendant may be allowed to amend his bill of particulars on the trial by citing the correct pages of deed books. Summers v. Brady, 56 Miss. 10, 1878 Miss. LEXIS 33 (Miss. 1878).

RESEARCH REFERENCES

ALR.

Comment Note: Common source of title doctrine. 5 A.L.R.3d 375.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Ejectment, Form 13 (Bill of particulars and abstract of documentary evidence of title).

CJS.

28A C.J.S., Ejectment § 199-206.

§ 11-19-55. Either party may have a survey made.

In case either party shall desire a survey to be made of the premises sued for in ejectment, he may cause the same to be made, after the institution of the suit, by applying to the clerk of the court in which the suit is brought to issue a commission for that purpose, directed to the county surveyor, or other surveyor, authorizing him to make a survey of the premises, and report the same, under oath, to the court at the next term. Such a survey shall not be made without first giving five days' notice to the opposite party at the time of making the same. The party at whose instance the survey was made shall pay the expenses thereof, but may recover the same as costs, in case he succeed in the action and the judgment be that the survey was necessary in deciding the issue.

HISTORY: Codes, 1857, ch. 55, art. 21; 1871, § 1558; 1880, § 2492; 1892, § 1653; 1906, § 1828; Hemingway's 1917, § 1461; 1930, § 1454; 1942, § 805.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Either party may introduce in evidence surveys made after the institution of the suit, and the testimony of the surveyors in reference thereto. Cannon v. Yarbrough, 127 Miss. 186, 127 Miss. 189, 89 So. 911, 1921 Miss. LEXIS 212 (Miss. 1921).

Code 1892, § 1653, does not modify the rule of evidence which permits a party to introduce maps of the premises and testimony of the surveyors who made the survey explanatory thereof, and such maps and testimony are admissible, although the survey referred to therein was not made in compliance with the provisions of the code. Lenoir v. People's Bank of Laurel, 87 Miss. 559, 40 So. 5, 1905 Miss. LEXIS 162 (Miss. 1905).

§ 11-19-57. Action not abated by death.

The death of a plaintiff or defendant in ejectment shall not cause the action to abate, but it may be continued after timely substitution of parties as prescribed by the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1857, ch. 55, art. 22; 1871, § 1559; 1880, § 2493; 1892, § 1654; 1906, § 1829; Hemingway's 1917, § 1462; 1930, § 1455; 1942, § 806; Laws, 1991, ch. 573, § 43, eff from and after July 1, 1991.

Cross References — Actions which survive generally, see § 91-7-233.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

§§ 11-19-59 through 11-19-79. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-19-59. [Codes, 1857, ch. 55, art. 23; 1871, § 1560; 1880, § 2494; 1892, § 1655; 1906, § 1830; Hemingway's 1917, § 1463; 1930, § 1456, 1942, § 807]

§ 11-19-61. [Codes, 1857, ch. 55, art. 24; 1871, § 1561; 1880, § 2495; 1892, § 1656; 1906, § 1831; Hemingway's 1917, § 1464; 1930, § 1457; 1942, § 808]

§ 11-19-63. [Codes, 1857, ch. 55, art. 25; 1871, § 1562; 1880, § 2496; 1892, § 1657; 1906, § 1832, Hemingway's 1917, § 1465; 1930, § 1458; 1942, § 809]

§ 11-19-65. [Codes, 1857, ch. 55, art. 26; 1871, § 1563; 1880, § 2497; 1892, § 1658; 1906, § 1833; Hemingway's 1917, § 1466; 1930, § 1459; 1942, § 810]

§ 11-19-67. [Codes, 1857, ch. 55, art. 27; 1871, § 1564; 1880, § 2498; 1892, § 1659; 1906, § 1834, Hemingway's 1917, § 1467; 1930, § 1460; 1942, § 811]

§ 11-19-69. [Codes, 1857, ch. 55, art. 28; 1871, § 1565; 1880, § 2499, 1892, § 1660; 1906, § 1835; Hemingway's 1917, § 1468; 1930, § 1461; 1942, § 812]

§ 11-19-71. [Codes, 1857, ch. 55, art. 29; 1871, § 1566; 1880, § 2500; 1892, § 1661; 1906, § 1836; Hemingway's 1917, § 1469; 1930, § 1462; 1942, § 813]

§ 11-19-73. [Codes, 1857, ch. 55, art. 30; 1871, § 1567; 1880, § 2501; 1892, § 1662; 1906, § 1837; Hemingway's 1917, § 1470; 1930, § 1463; 1942, § 814]

§ 11-19-75. [Codes, 1857, ch. 55, art. 31; 1871, § 1568; 1880, § 2502; 1892, § 1663; 1906, § 1838; Hemingway's 1917, § 1471; 1930, § 1464; 1942, § 815]

§ 11-19-77. [Codes, 1857, ch. 55, art. 34; 1871, § 1571; 1880, § 2515; 1892, § 1664; 1906, § 1839, Hemingway's 1917, § 1472; 1930, § 1465; 1942, § 816]

§ 11-19-79. [Codes, 1857, ch. 55, art. 14; 1871, § 1552; 1880, § 2503; 1892, § 1665; 1906, § 1840; Hemingway's 1917, § 1473; 1930, § 1466; 1942, § 817]

Editor's Notes — Former § 11-19-59 pertained to the situation where one of several plaintiffs died.

Former § 11-19-61 pertained to the situation where one of several plaintiffs died after verdict or judgment.

Former § 11-19-63 pertained to the situation where a plaintiff died and plaintiff's rights did not survive.

Former § 11-19-65 pertained to the situation where the sole plaintiff died after verdict.

Former § 11-19-67 pertained to the situation where one of several defendants died before judgment.

Former § 11-19-69 pertained to the situation where all defendants died before trial.

Former § 11-19-71 pertained to the situation where all defendants died after verdict.

Former § 11-19-73 pertained to the situation where one of several defendants who defended separately died.

Former § 11-19-75 pertained to the situation where one of several defendants who defended separately for the same property which another defendant defended dies.

Former § 11-19-77 defined "legal representative."

Former § 11-19-79 pertained to the trial and its incidents.

§ 11-19-81. When title of plaintiff has expired.

If it appear at the trial that the plaintiff or plaintiffs, or one (1) of them, was, at the commencement of the action, entitled to recover possession of the premises in question, or of some part thereof, but that his or their title has expired at the time of the trial, the plaintiff or plaintiffs so entitled shall, notwithstanding such expiration, have a verdict according to the fact that he had such right of recovery at the commencement of the action, and shall recover his costs of suit; but as to the premises claimed, the judgment shall be that the plaintiff be involuntarily dismissed.

HISTORY: Codes, 1857, ch. 55, art. 15; 1871, § 1553; 1880, § 2504; 1892, § 1666; 1906, § 1841; Hemingway's 1917, § 1474; 1930, § 1467; 1942, § 818; Laws, 1991, ch. 573, § 44, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-83. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 55, art. 16; 1871, § 1554; 1880, § 2505; 1892, § 1667; 1906, § 1842; Hemingway's 1917, § 1475; 1930, § 1468; 1942, § 819]

Editor's Notes — Former § 11-19-83 provided for the successful party to recover costs.

§ 11-19-85. Trial of action between cotenants.

In case the action be brought by some one of several persons entitled as joint tenants, tenants in common, or coparceners, any joint tenant, tenant in common, or coparcener defending the action, may give notice with his answer or other defense that he admits the right of the plaintiff to an undivided share of the property, stating what share, but denies any actual ouster of him from the property. Upon the trial of the issue, if it appear that the defendant is a joint tenant, tenant in common, or coparcener with the plaintiff, and actual ouster shall not be proved, then the plaintiff shall be involuntarily dismissed, with costs. But if it be proved either that the defendant is not a joint tenant, tenant in common, or coparcener, or that an actual ouster had taken place, then the jury shall so find by the verdict, and the plaintiff shall have judgment in accordance with the verdict for the recovery of possession and costs.

HISTORY: Codes, 1857, ch. 55, art. 18; 1871, § 1555; 1880, § 2506; 1892, § 1668; 1906, § 1843; Hemingway's 1917, § 1476; 1930, § 1469; 1942, § 820; Laws, 1991, ch. 573, § 45, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

From an early date, it has been recognized in this jurisdiction that the entry of an heir into the possession of property with a notorious claim of exclusive right may disseize the other heirs, his cotenants. Bayless v. Alexander, 245 So. 2d 17, 1971 Miss. LEXIS 1349 (Miss. 1971).

Under a former enactment of these provisions (§§ 2506, 2512, Code of 1880), a tenant in common who had been ousted by his co-tenant might maintain a judgment against him and recover rents and profits in the same action. Clay v. Field, 115 U.S. 260, 6 S. Ct. 36, 29 L. Ed. 375, 1885 U.S. LEXIS 1835 (U.S. 1885).

§ 11-19-87. When a crop is growing on the land.

If the jury find for the plaintiff in an action of ejectment, and the defendant have a crop then planted and growing upon the premises in question, it shall assess a reasonable rent for the plaintiff to receive for the use of the premises, for such time as it may think necessary for the defendant to make and gather his crop. If the defendant enter into bond with security, to be approved by the court, or by the clerk in vacation, in a penalty of double the amount of rent so assessed, payable to the plaintiff, conditioned for the payment of the rent assessed at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then a writ of possession shall not issue upon the judgment in the action, until the expiration of the time so allowed by the jury. The bond shall be filed in the office of the clerk of the court, and, if forfeited, shall have the force and effect of a judgment, and execution may issue thereon against the principal and sureties as upon other judgments in the court.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1 (88), 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2507; 1892, § 1669; 1906, § 1844; Hemingway's 1917, § 1477; 1930, § 1470; 1942, § 821.

Cross References — Landlord's lien for supplies furnished sharecropper, see § 85-7-1.

Other landlord's liens on agricultural products, see §§ 89-7-51, 89-7-53.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

21A Am. Jur. 2d, Crops §§ 32- 33.

§ 11-19-89. Proceedings as to crop upon affirmance of judgment in Supreme Court.

If a judgment in favor of the plaintiff in an action of ejectment be affirmed by the Supreme Court, and the appellant have a crop then planted and growing upon the premises in question, and shall file with the clerk of the circuit court in which the judgment was recovered an affidavit of the fact, and shall undertake, in writing, with such sureties and such sum as the clerk may require, to pay to the opposite party the rent which may be adjudged to be paid for the use and occupation of said premises until the end of the current year, a writ of possession shall not issue until the end of the year, and the affidavit and security for rent shall be filed by the clerk among the papers in the case. The clerk may examine the parties and other persons on oath as to the value of such rent and the sufficiency of the sureties, and may require their statements to be written and signed by them.

HISTORY: Codes, 1880, §§ 2508, 2509; 1892, § 1670; 1906, § 1845; Hemingway's 1917, § 1478; 1930, § 1471; 1942, § 822.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-91. Judgment on the bond in proceedings involving crop.

If such rent be not paid, on motion of the plaintiff, a motion to assess damages shall be executed at the next or any future term of the circuit court to ascertain the value of the rent of said premises, and judgment shall be rendered on the verdict for the amount found by the jury against the parties bound on such undertaking for rent. If any have died, like proceedings shall be had as provided in case of the death of any of the sureties on the bond of a claimant of personal property levied on under execution before final judgment.

HISTORY: Codes, 1880, § 2510; 1892, § 1671; 1906, § 1846; Hemingway's 1917, § 1479; 1930, § 1472; 1942, § 823; Laws, 1991, ch. 573, § 46, eff from and after July 1, 1991.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-93. Exceptions to insufficient bond.

If the plaintiff allege that the amount of the security required by the clerk for rent to prevent the issuance of a writ of possession is insufficient, the circuit judge, in term time or vacation, shall hear the allegations and inquire into the matter, and may order a new undertaking for the rent to be given within such time as he shall prescribe; and if it shall not be given, a writ of possession shall be issued as if security for rent had not been given. Five days' notice of such complaint to the circuit judge shall be given to the opposite party.

HISTORY: Codes, 1880, § 2511; 1892, § 1672; 1906, § 1847; Hemingway's 1917, § 1480; 1930, § 1473; 1942, § 824.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-95. Mesne profits and compensation for improvements.

In all cases where the defendant in ejectment would be liable for mesne profits and damages, the plaintiff may declare for and recover the same in the action of ejectment, or he may have his action for mesne profits after the recovery in ejectment as heretofore. It shall be lawful in all cases for the defendant in ejectment, whether the plaintiff demand mesne profits or damages or not, or in an action of mesne profits, to plead the value of all permanent, valuable and not ornamental improvements made on the land by the defendant, or by any one under whom he holds, before notice of the intention of the plaintiff to bring the action, and all taxes that may have been lawfully paid on the land by defendant or those under whom he holds up to the date of trial, including interest, costs, and damages incident to such taxes; but a defendant shall not be entitled to such compensation for improvements or taxes unless he claim the premises under some deed or contract of purchase acquired or made in good faith.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 13 (1); 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1673; 1906, § 1848; Hemingway's 1917, § 1481; 1930, § 1474; 1942, § 825.

Cross References — Finding value of improvements, see § 11-19-97.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Mesne profits, generally.
2. Improvements.
3. —Good faith.
4. Setting off improvements and mesne profits.

1. Mesne profits, generally.

The statute of limitations of six years applies to the demand for rents asserted by plaintiff in ejectment. Lindenmayer v. Gunst, 70 Miss. 693, 13 So. 252, 1893 Miss. LEXIS 61 (Miss. 1893).

Under a former enactment of these provisions (§§ 2506, 2512, Code of 1880), a tenant in common who had been ousted by his co-tenant might maintain a judgment against him and recover rents and profits in the same action. Clay v. Field, 115 U.S. 260, 6 S. Ct. 36, 29 L. Ed. 375, 1885 U.S. LEXIS 1835 (U.S. 1885).

Remaindermen cannot, in ejectment or any other action, recover mesne profits which have accrued during the continuance of the life estate, and the owner of the life estate cannot recover compensation for improvements made during the existence of such estate. Pass v. McLendon, 62 Miss. 580, 1885 Miss. LEXIS 112 (Miss. 1885).

The statute of limitations of six years, and not three, applies to a demand for mesne profits. Dean v. Tucker, 58 Miss. 487, 1880 Miss. LEXIS 148 (Miss. 1880).

The plaintiff, if he demand mesne profits in his ejectment suit, may recover them up to the trial. Bell v. Medford, 57 Miss. 31, 1879 Miss. LEXIS 7 (Miss. 1879); Dean v. Tucker, 58 Miss. 487, 1880 Miss. LEXIS 148 (Miss. 1880).

The judgment, where the mesne profits are demanded, is a bar to a subsequent action for the mesne profits which accrued pending the suit. Bell v. Medford, 57 Miss. 31, 1879 Miss. LEXIS 7 (Miss. 1879).

It is optional with the plaintiff to demand the mesne profits in his action of ejectment, or he may sue for them in a subsequent action. Emrich v. Ireland, 55 Miss. 390, 1877 Miss. LEXIS 148 (Miss. 1877).

2. Improvements.

Where specific performance was denied purchaser who defaulted, court properly awarded purchaser sum for permanent and valuable improvements. Swalm v. Gill, 151 Miss. 630, 118 So. 446, 1928 Miss. LEXIS 346 (Miss. 1928).

Statute followed by court of equity in awarding compensation to occupant of land when dispossessed by the true owner thereof. Pritchett v. Stevens, 126 Miss. 221, 88 So. 627, 1921 Miss. LEXIS 26 (Miss. 1921); Pritchett v. Hibbler, 126 Miss. 379, 88 So. 882, 1921 Miss. LEXIS 45 (Miss. 1921).

Compensation for improvements is applicable only where there can be a demand for mesne profits, and improvements put upon land by the life tenant pass to the remainderman, and as the life tenant is not liable for rents, he is not entitled to compensation for improvements made during the existence of his estate. Deanes v. Whitfield, 107 Miss. 273, 65 So. 246, 1914 Miss. LEXIS 78 (Miss. 1914).

A defendant, purchaser for value in good faith, can obtain relief for valuable, permanent and not ornamental improvements in a suit at law and has no ground because thereof for a suit in equity. Demourelle v. Piazza, 77 Miss. 433, 27 So. 623, 1899 Miss. LEXIS 93 (Miss. 1899).

As to improvements made on land acquired under guardian sale that is void, see Hicks v. Blakeman, 74 Miss. 459, 21 So. 7, 1896 Miss. LEXIS 137 (Miss. 1896).

The defendant in ejectment can recover compensation for improvements put upon the land sued upon only where the plaintiff has the right to demand mesne profits of the defendant. Pass v. McLendon, 62 Miss. 580, 1885 Miss. LEXIS 112 (Miss. 1885).

The value of improvements should be assessed on a basis coextensive in time with the estimate of rents which they contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit. Johnson v. Futch, 57 Miss. 73, 1879 Miss. LEXIS 16 (Miss. 1879).

If the defendant omit to claim and establish the value of improvements, he cannot get relief in equity. Gaines v. Kennedy, 53 Miss. 103, 1876 Miss. LEXIS 42 (Miss. 1876).

In ejectment the defendant is entitled to pay for all improvements not ornamental in their character. The notice with the plea, stating the nature and value of the improvements, was sufficiently definite. Wilson v. Williams' Heirs, 52 Miss. 487, 1876 Miss. LEXIS 245 (Miss. 1876).

3. —Good faith.

Where taxpayer notified patentee that he had no title because of insufficiency of description in assessment roll and list of lands struck off, patentee made further improvements at his peril, and could not recover therefor on cancellation of his title. Brown v. Womack, 181 Miss. 66, 178 So. 785, 1938 Miss. LEXIS 52 (Miss. 1938).

"Good faith" of a purchaser of land, as used in statute allowing compensation for improvements made by such purchaser, is not used in the technical sense applied to conveyances, but means only that purchase money was genuinely paid without any knowledge or suspicion of fraud, either by purchaser or vendor. Brunt v. McLaurin, 178 Miss. 86, 172 So. 309, 1937 Miss. LEXIS 181 (Miss. 1937).

Purchaser held entitled under statute to value of house built during his possession of land in good faith belief that he had full title, as against heirs of wife of his remote grantor who owned a half interest, irrespective of his constructive notice of their rights by recorded deed in the chain of title. Brunt v. McLaurin, 178 Miss. 86, 172 So. 309, 1937 Miss. LEXIS 181 (Miss. 1937).

Where defendants claimed title to the land sued for, not only through complainants' ancestor, but chiefly through the purchaser of land at a tax sale, without actual or constructive notice of a prior deed from such purchaser to another through whom complainants also claimed, defendants were entitled to a sum expended for improvements upon decreeing title to be in complainants. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, 1910 Miss. LEXIS 74 (Miss. 1910).

A defendant in ejectment cannot claim for improvements unless, when he placed them on the land, he was claiming under some deed or contract of purchase made or acquired in good faith. It is not sufficient that at the time he honestly expected the owner, whose title he recognized, would eventually give him the land. Thomas v. Thomas, 69 Miss. 564, 13 So. 666, 1891 Miss. LEXIS 139 (Miss. 1891).

If defendant know the facts but mistake the law, he is not, in case the law be against him, a bona fide purchaser. Holmes v. McGee, 64 Miss. 129, 8 So. 169, 1886 Miss. LEXIS 29 (Miss. 1886).

The bona fide possessor of lands entitled to improvements is one who not only supposes himself to be the true owner, but who is ignorant that his title is contested by another claiming a better right. The want of good faith cannot be inferred merely because the defect of title could have been ascertained by an examination of the records. Cole v. Johnson, 53 Miss. 94, 1876 Miss. LEXIS 41 (Miss. 1876); Gaines v. Kennedy, 53 Miss. 103, 1876 Miss. LEXIS 42 (Miss. 1876); Emrich v. Ireland, 55 Miss. 390, 1877 Miss. LEXIS 148 (Miss. 1877); Citizens' Bank v. Costanera, 62 Miss. 825, 1885 Miss. LEXIS 156 (Miss. 1885).

4. Setting off improvements and mesne profits.

In suit to cancel tax title to land, evidence held to support decree awarding plaintiff rents for part of years defendant had possession, and setting off defendant's improvement against rents of remaining years. Brown v. Womack, 181 Miss. 66, 178 So. 785, 1938 Miss. LEXIS 52 (Miss. 1938).

The effect of this section [Code 1942, § 825] is to require the jury to find in favor of a successful plaintiff in ejectment the amount of rents and profits, and, as against this, in favor of defendant, the value of improvements and taxes, in all cases where the declaration demands mesne profits or where the defendant claims for improvements and taxes. The assertion of such claim by either party necessarily involves the whole matter of the accounting as provided for in this section. Gillum v. Case, 71 Miss. 848, 16 So. 236, 1894 Miss. LEXIS 36 (Miss. 1894).

In ejectment for a tract of land, only a portion of which the defendant had improved, the jury, in assessing mesne profits and the value of the improvements, may deal with the entire tract together, although the defendant claims the improved part under separate conveyance. Johnson v. Futch, 57 Miss. 73, 1879 Miss. LEXIS 16 (Miss. 1879).

RESEARCH REFERENCES

ALR.

Compensation for improvements made or placed on premises of another by mistake. 57 A.L.R.2d 263.

Private improvement of land dedicated but not used as street as estopping public rights. 36 A.L.R.4th 625.

Am. Jur.

25 Am. Jur. 2d, Ejectment §§ 49- 52.

CJS.

28A C.J.S., Ejectment §§ 226 et seq.

§ 11-19-97. How improvements estimated and judgment therefor.

The jury shall find the actual cash value of such improvements and the amount of taxes paid, the value of the mesne profits and damages, and the actual cash value of the land without the improvements. Where the value of the improvements and taxes exceed the value of the mesne profits and damages, the defendant shall have a lien upon the land for the difference between the value of the mesne profits and the value of the improvements and taxes so found, and execution shall not issue in favor of the plaintiff until he shall have paid the amount so due to the defendant. Unless the plaintiff, within three months after the rendition of the verdict, pay the amount so due, the defendant may pay to the plaintiff the assessed value of the land with interest from the date of the verdict, and pay the costs of the suit, and thereupon the execution of the judgment for the recovery of the land shall be perpetually stayed. If the defendant fail to pay to the plaintiff the value of the land so assessed, with interest and costs of suit, within three months after the expiration of the time allowed the plaintiff for making payment, an execution shall issue for the sale of the land recovered in the ejectment.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 13 (3); 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1674; 1906, § 1849; Hemingway's 1917, § 1482; 1930, § 1475; 1942, § 826.

Cross References — Liens generally, see § 85-7-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If a defendant in ejectment be a purchaser for value in good faith and have placed valuable permanent, and not ornamental, improvement on the premises, he can obtain adequate relief on account of said improvements in the suit at law. Demourelle v. Piazza, 77 Miss. 433, 27 So. 623, 1899 Miss. LEXIS 93 (Miss. 1899).

Although a plaintiff in ejectment fails to demand or prove mesne profits and rents, if the defendant pleads and is allowed for improvements and pays plaintiff the value of the land, without the improvement as assessed, the latter cannot afterward resort to an independent action to recover of defendant mesne profits. Gillum v. Case, 71 Miss. 848, 16 So. 236, 1894 Miss. LEXIS 36 (Miss. 1894).

The remainderman cannot recover mesne profits which accrued during the particular estate and the owner of the particular estate is not entitled to compensation for improvements made during his term. Pass v. McLendon, 62 Miss. 580, 1885 Miss. LEXIS 112 (Miss. 1885).

The value of improvements should be assessed on a basis coextensive in time with the estimate of rents and profits, so as to allow the defendant for all of his improvements of which the plaintiff recovers the benefit. Johnson v. Futch, 57 Miss. 73, 1879 Miss. LEXIS 16 (Miss. 1879).

If the suit be for a tract, only a portion of which the defendants have improved, the jury may, in stating the account, deal with the entire tract together, although the defendant claim the improved portion under a separate deed. Johnson v. Futch, 57 Miss. 73, 1879 Miss. LEXIS 16 (Miss. 1879).

The plaintiff, if entitled to recover the premises, should be allowed the rents of the property as improved. Miller v. Ingram, 56 Miss. 510, 1879 Miss. LEXIS 155 (Miss. 1879).

Where the improvements have been destroyed by a casualty, and the defendant is denied compensation therefor on that account, the amount of the mesne profits or rent which plaintiff may recover is the reasonable value of the rent of the premises without such improvement. Nixon v. Porter, 38 Miss. 401, 1860 Miss. LEXIS 13 (Miss. 1860).

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. 2d, Ejectment § 52.

41 Am. Jur. 2d, Improvements §§ 18 et seq.

CJS.
28A C.J.S., Ejectment §§ 235, 248, 249, 250, 251 et seq.

§ 11-19-99. How proceeds divided in case of sale.

The proceeds of the sale, after payment of costs, shall be divided between the plaintiff and the defendant in proportion to the sums due them respectively as found by the verdict.

HISTORY: Codes, 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1675; 1906, § 1850; Hemingway's 1917, § 1483; 1930, § 1476; 1942, § 827.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-101. Reversioner or remainderman to have appeal.

If a tenant for life be impleaded, and judgment given against him for the lands or tenements, then the person to whom the reversion or remainder belongs at the time of such judgment, his heirs or successors, may have an appeal as well in the lifetime of the tenant as after his death. If the judgment be reversed, the tenant, if living, shall be restored to the possession of the lands or tenements, and the party prosecuting the appeal shall be entitled to the arrearages of rent for the same. If the tenant be dead at the time of judgment given on the appeal, then restitution of the lands or tenements shall be made to the party prosecuting the appeal, together with the arrearages of rent. If the party prosecuting the appeal allege that the judgment first obtained against the tenant was by covin or assent, then restitution shall be made to the party prosecuting such appeal with arrearages of rent, although the tenant be living; but in such case the tenant may have a scire facias against the party appealing if he deny and traverse the covin or assent, but not otherwise.

HISTORY: Codes, 1880, § 2518; 1892, § 1676; 1906 § 1851; Hemingway's 1917, § 1484; 1930, § 1477; 1942, § 828.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

CJS.
28A C.J.S., Ejectment § 221.

§ 11-19-103. Judgment as res adjudicata.

A judgment in an action of ejectment shall be conclusive as to the right of possession established upon the party against whom it is recovered, and upon all persons claiming from, through, or under such party, by title arising after the commencement of the action; but if any person against whom such judgment is recovered shall be, at the time of its recovery, an infant or person of unsound mind, the judgment shall not be a bar to an action commenced by such person, or any one claiming by inheritance from, through, or under him, within three years after the removal of his disability.

HISTORY: Codes, 1857, ch. 55, art. 32; 1871, § 1569; 1880, § 2513; 1892, § 1677; 1906, § 1852; Hemingway's 1917, § 1485; 1930, § 1478; 1942, § 829.

Cross References — Definition of "infant", see § 1-3-21.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Owner, not made party to and not having notice of an action in ejectment against a tenant of a tenant, is not affected by the judgment. Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827, 1908 Miss. LEXIS 250 (Miss. 1908).

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. 2d, Ejectment § 47.

§ 11-19-105. Record may be recorded as a deed.

A certified copy of the complaint, the writ, the answer or other defense, if any, and the judgments in an ejectment suit may be recorded, without acknowledgment by anyone, in the proper record of conveyances of land in the county in which the land is situated; and the same shall be indexed as a deed from the unsuccessful party to the party in whose favor the final judgment is rendered.

HISTORY: Codes, 1892, § 1678; 1906, § 1853; Hemingway's 1917, § 1486; 1930, § 1479; 1942, § 830; Laws, 1991, ch. 573, § 47, eff from and after July 1, 1991.

Cross References — Recording of instruments, see § 89-5-1.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Jurisdiction respecting conclusive adjudication of land titles rests alone with circuit and chancery courts, and to limited extent with county courts. Vansant v. Dodds, 164 Miss. 787, 144 So. 688, 1932 Miss. LEXIS 254 (Miss. 1932).

CHAPTER 21.

PARTITION OF PROPERTY

Realty. 11-21-1
Personalty. 11-21-71

REALTY

Sec.
11-21-1. Partition by agreement and by arbitration; partition of homestead property.
11-21-3. Partition by decree of chancery court.
11-21-5. Parties to proceedings for partition.
11-21-7. Proceedings same as in other cases; when ex parte petitions may be heard.
11-21-9. Controverted title and all equities disposed of.
11-21-11. Court may order sale in first instance.
11-21-13. Partition without masters; owelty.
11-21-15. Judgment appointing masters.
11-21-17. Oath of special commissioners.
11-21-19. Survey made and division into shares.
11-21-21. Allotment of shares by ballot.
11-21-23. Assignment of shares and owelty.
11-21-25. Report of special commissioners.
11-21-27. Land sold when not capable of division.
11-21-29. Compensation of masters.
11-21-31. Attorney's fees.
11-21-33. Owelty a lien.
11-21-35. Final judgment and judgment confirming partition.
11-21-37. Recording of judgments.
11-21-39. Lien created by party binding on his share.
11-21-41. Paramount rights not affected.
11-21-43. Party evicted to have partition of residue.
11-21-45. New partition; when.

§ 11-21-1. Partition by agreement and by arbitration; partition of homestead property.

(1) Partition of land held by adult joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties, and containing a description of the particular part allotted to each, and recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be binding and conclusive on the parties. They may also bind themselves by written agreement to submit the partition to the arbitrament of one or more persons to be chosen by them, and to abide the partition made by the arbitrators and the articles of submission; and the written award shall be recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be final and conclusive between the parties, unless made or procured by fraud.

(2) Homestead property exempted from execution that is owned by

spouses shall be subject to partition pursuant to the provisions of this section only, and not otherwise.

HISTORY: Codes, 1857, ch. 36, art. 48; 1871, § 1839; 1880, § 2552; 1892, § 3096; 1906, § 3520; Hemingway's 1917, § 2832; 1930, § 2919; 1942, § 960; Laws, 2009, ch. 517, § 1, eff from and after July 1, 2009.

Editor's Notes — Laws of 2009, ch. 517, § 2, provides:

"SECTION 2. This act shall take effect and be in force from and after July 1, 2009, and shall apply to all cases pending or filed on or after July 1, 2009."

Cross References — Who may submit to arbitration, see § 11-15-1.

Creation of estates in two or more persons, see § 89-1-7.

Partition with respect to condominiums, see §§ 89-9-15, 89-9-35, 89-9-37.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Partition by chancery decree.
3. Public policy.

1. In general.

Family settlements are favored by the courts, and generally will be permitted to stand even though based on mistake of law or fact where there is absence of conduct otherwise inequitable. Strong v. Cowsen, 197 Miss. 282, 19 So. 2d 813, 1944 Miss. LEXIS 298 (Miss. 1944).

Deed of partition executed by heirs of legitimate son of former owner in favor of heirs of illegitimate son pursuant to agreement compromising and settling the disputed claims of the heirs to avoid litigation, the parties at the time of the deed's execution not knowing the true facts, was not subject to cancelation on the ground of mutual mistake. Strong v. Cowsen, 197 Miss. 282, 19 So. 2d 813, 1944 Miss. LEXIS 298 (Miss. 1944).

Life tenants may divide their life estates and remaindermen may accept the partition made. Leflore v. Flowers, 117 Miss. 682, 78 So. 513 (Miss. 1918).

Tenants in common cannot make a partition by agreement binding on a judgment creditor whose lien has attached against the interest of one of them. Simmons v. Gordon, 98 Miss. 316, 53 So. 623, 1910 Miss. LEXIS 64 (Miss. 1910).

2. Partition by chancery decree.

Section relation to partition of land prohibits the partition of spousal homestead property by chancery decree because the phrase "homestead property exempt from execution" is not intended to bring specific limitations on creditors' rights to other statutes. Therefore, a chancery court could not enter a partition of land owned by spouses as joint tenants with a right of survivorship. Noone v. Noone, 127 So. 3d 193, 2013 Miss. LEXIS 647 (Miss. 2013).

3. Public policy.

Mississippi Supreme Court did not have the power to declare that section dealing with a chancery court's lack of power to enter a partition by order for spouses was against the public policy favoring the alienability of land because it only had the power of judicial review. Noone v. Noone, 127 So. 3d 193, 2013 Miss. LEXIS 647 (Miss. 2013).

RESEARCH REFERENCES

ALR.

Right to partition of overriding royalty interest in oil and gas leasehold. 58 A.L.R.3d 1052.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty. 92 A.L.R.3d 473.

Homestead Right of Cotenant as Affecting Partition. 83 A.L.R.6th 605.

Am. Jur.

59A Am. Jur. 2d, Partition §§ 17- 26.

14 Am. Jur. Legal Forms 2d, Partition, §§ 193:19-193:38 (Documents providing for and affecting voluntary partition).

CJS.

68 C.J.S., Partition §§ 10-18.

§ 11-21-3. Partition by decree of chancery court.

Partition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five (5), may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated; or, if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.

However, any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of said land and have the interest of such person set apart in fee simple free from the claims of life or other tenants, remaindermen or reversioners, provided the life or other tenants, and other known living persons having an interest in the lands, are made defendants if they do not join in the proceeding as plaintiffs.

HISTORY: Codes, 1857, ch. 36, art. 48; 1871, § 1811; 1880, § 2553; 1892, § 3097; 1906, § 3521; Hemingway's 1917, § 2833; 1930, § 2920; 1942, § 961; Laws, 1946, ch. 317, § 1; Laws, 1991, ch. 573, § 48, eff from and after July 1, 1991.

Cross References — Jurisdiction of the chancery court, see § 9-5-81.

Rule that exempt property of a decedent is not subject to partition in certain cases, see § 91-1-23.

Where a person entitled to a distributive share of a deceased's estate may compel distribution, see § 91-7-303.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Title or interest necessary; parties.
3. Lands of decedent.
4. Lands subject to encumbrance, homestead or dower interest.
5. Jurisdiction and venue.

1. In general.

Denial of the husband's request to partition real property jointly titled to him and his former wife was appropriate because the absence of a termination provision meant that no termination of the terms was intended. Therefore, partitioning the property would have been in violation of the intent of the Agreement and Property Settlement between the parties. Hawkins v. Hawkins, 45 So. 3d 1212, 2010 Miss. App. LEXIS 140 (Miss. Ct. App.), cert. denied, 49 So. 3d 636, 2010 Miss. LEXIS 549 (Miss. 2010).

Partition under Miss. Code Ann. § 11-21-3 was granted to a former wife where a former husband conveyed his one-half interest in a martial residence to his new wife, but retained a life estate; this use and occupancy of the property was contrary to the terms of the divorce decree. Mosby v. Mosby, 962 So. 2d 119, 2007 Miss. App. LEXIS 490 (Miss. Ct. App. 2007).

Mere sentimental attachment to ancestral home did not render the property incapable of partition in kind, or take precedence over the right of a cotenant to have his share set aside where the real property was clearly subject to partition in kind. Mobley v. Mobley, 827 So. 2d 714, 2002 Miss. App. LEXIS 529 (Miss. Ct. App. 2002).

Wife's prior unsuccessful divorce action against her husband did not bar her subsequent action for statutory partition of the parties' real and personal property pursuant to Miss. Code Ann. §§ 11-21-3 and 11-21-71; doctrine of res judicata did not apply as the divorce and the partition action did not share identity of cause of action. Miller v. Miller, 838 So. 2d 295, 2002 Miss. App. LEXIS 434 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. App. LEXIS 167 (Miss. Ct. App. 2003).

Chancellor abused his discretion in attempting to fashion a unique remedy to sever a cotenancy, ignoring statutes of the state defining the only lawful method available to accomplish that purpose the right of partition being an absolute right of a tenant in common. Murphree v. Cook, 822 So. 2d 1092, 2002 Miss. App. LEXIS 180 (Miss. Ct. App. 2002).

The right to partition property is absolute with the exception of the limitation placed on homestead property. Cheeks v. Herrington, 523 So. 2d 1033, 1988 Miss. LEXIS 211 (Miss. 1988).

The defense of laches was unavailable in an action for partition of property where there was no "ouster" of the cotenant seeking partition. Cheeks v. Herrington, 523 So. 2d 1033, 1988 Miss. LEXIS 211 (Miss. 1988).

Question of whether party asserting interest in property, which had been inherited through Mississippi laws of descent and distribution, should be prohibited in equity from doing so was not appropriate matter for decision on motion for summary judgment, where heir at law did not intend to relinquish any inherited rights by signing final estate decree and signed for sole purpose of settling will contest between children and widow, where evidence existed that persons taking under estate decree also knew of and recognized interest of heir at law in property, and he took action to assert his interest in that property. Sumrall v. Doggett, 511 So. 2d 908, 1987 Miss. LEXIS 2612 (Miss. 1987).

Right of partition is subject to paramount authority and responsibility of Chancery Court to make orders which are necessary and appropriate for care, custody, and maintenance of children of marriage; claim of husband that partition through judicial sale should have been granted instead of awarding wife exclusive use of homestead property was rejected. Regan v. Regan, 507 So. 2d 54, 1987 Miss. LEXIS 2441 (Miss. 1987), overruled, Tramel v. Tramel, 740 So. 2d 286, 1999 Miss. LEXIS 252 (Miss. 1999). But see Tramel v. Tramel, 740 So. 2d 286, 1999 Miss. LEXIS 252 (Miss. 1999).

Hardship is not defense to right of partition. Daughtrey v. Daughtrey, 474 So. 2d 598, 1985 Miss. LEXIS 2454 (Miss. 1985).

A former husband was properly precluded from partitioning certain real estate owned by his ex-wife and him as tenants in common, where the parties' settlement agreement gave the ex-wife the right to occupy the residence situated on the real estate, and such proposed partition might have had the effect of annulling the ex-wife's right to so occupy the residence. Rushing v. Rushing, 414 So. 2d 429, 1982 Miss. LEXIS 2025 (Miss. 1982).

A divorced wife was not entitled to partition of the former marital home where the property agreement entered into by the parties had provided that the husband would have the exclusive use, possession and control of the home. Weeks v. Weeks, 403 So. 2d 148, 1981 Miss. LEXIS 2156 (Miss. 1981).

Under the rule that all that is necessary for a partition is that the parties be cotenants of whatever to be partitioned, a prior decree of divorce granting the wife exclusive use of the parties' former marital home did not create a property right in the ex-wife which would defeat her own partition action under this section, since the ex-wife had the same status respecting the property after the divorce as she had prior to the divorce. Blackmon v. Blackmon, 350 So. 2d 44, 1977 Miss. LEXIS 2207 (Miss. 1977).

Prior to the 1946 amendment, partition was a possessory proceeding only, and the court could not adjudicate rights of owners of future interests. Hemphill v. Mississippi State Highway Com., 245 Miss. 33, 145 So. 2d 455, 1962 Miss. LEXIS 529 (Miss. 1962).

Bill which is sufficient in substance and contains prayer for general relief in addition to special prayer that property be sold for partition is sufficient to support decree for partition in kind. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908, 1949 Miss. LEXIS 439 (Miss. 1949).

Joint interests of tenants in common in a freehold may not be sold for division if it can be partitioned in kind. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

The burden of establishing the nonsusceptibility of joint interests in a freeholder to partition in kind is upon the complainant seeking partition by sale. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

Whether it is physically possible or economically practicable or whether it will better promote the interests of all parties to decree a partition by sale, depends upon the facts in any particular case. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

The generality that mineral estates may not be divided in kind may not be determined by judicial notice. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

The test of feasibility of division in kind of mineral interests held by tenants in common should relate not to the difficulty of ascertainment of that which is speculative, but rather to the practicability of division of that which is apparent. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

Cross-bill seeking partition of personalty and partnership accounting was germane to original bill for partition of specific lands. Barry v. Mattocks, 156 Miss. 424, 125 So. 554, 1930 Miss. LEXIS 143 (Miss. 1930).

Suit to correct erroneous boundaries, due to mistake unknown to all parties, is an original suit giving equity power to correct mistake where no innocent party will suffer, and is not a bill of review. Brown v. Wesson, 114 Miss. 216, 74 So. 831, 1917 Miss. LEXIS 23 (Miss. 1917).

Partition sale is statutory and not dependent on common law or equity. Forest Product & Mfg. Co. v. Buckley, 107 Miss. 897, 66 So. 279, 1914 Miss. LEXIS 154 (Miss. 1914).

Partition does not affect rights of remaindermen. Lawson v. Bonner, 88 Miss. 235, 40 So. 488, 1906 Miss. LEXIS 113 (Miss. 1906).

Interest of remaindermen, made party to partition suit, should not be taxed with any costs of proceedings. Lawson v. Bonner, 88 Miss. 235, 40 So. 488, 1906 Miss. LEXIS 113 (Miss. 1906).

Decree for partition is interlocutory and may be modified or reversed any time before final decision. Sweatman v. Dean, 86 Miss. 641, 38 So. 231, 1905 Miss. LEXIS 16 (Miss. 1905).

A demand for rents may be joined in a bill for partition. Medford v. Frazier, 58 Miss. 241, 1880 Miss. LEXIS 115 (Miss. 1880).

2. Title or interest necessary; parties.

Chancellor did not erroneously order the sale of land held in the name of a closely held corporation because the corporation's shareholders consented to the order. Scafidi v. Hille, 180 So. 3d 634, 2015 Miss. LEXIS 603 (Miss. 2015).

Section relation to partition of land prohibits the partition of spousal homestead property by chancery decree because the phrase "homestead property exempt from execution" is not intended to bring specific limitations on creditors' rights to other statutes. Therefore, a chancery court could not enter a partition of land owned by spouses as joint tenants with a right of survivorship. Noone v. Noone, 127 So. 3d 193, 2013 Miss. LEXIS 647 (Miss. 2013).

This section allows the joinder of a life estate and the remaindermen to create an estate authorized to institute a suit in partition. Banks v. Banks, 367 So. 2d 1364, 1979 Miss. LEXIS 2232 (Miss. 1979).

Owners of future interests are subject to partition if made parties defendant by persons having possessory estates; and unborn takers of future interests are reached by virtual representation. Hemphill v. Mississippi State Highway Com., 245 Miss. 33, 145 So. 2d 455, 1962 Miss. LEXIS 529 (Miss. 1962).

The right of the devisee of an interest in land from his father to seek a partition by sale and division of proceeds is not affected by the fact that he has also an interest under his mother's will which contained a provision that the property may be sold only by mutual consent of the interested parties. Holliday v. Hedge, 243 Miss. 707, 139 So. 2d 866, 1962 Miss. LEXIS 396 (Miss. 1962).

Owners of an undivided two-thirds interest in land can obtain a partition in kind and so acquire a fee simple title to the parts allotted to them free from the claims of a life tenant in the other one-third interest and contingent remaindermen who might claim such one-third interest, provided that such claimants are made parties to the proceeding. Copeland v. West, 202 Miss. 106, 30 So. 2d 610, 1947 Miss. LEXIS 246 (Miss. 1947).

A deed conveying an undivided interest in a residence and reserving to the grantor the right during his lifetime to live on the premises with the grantee, free of rent, which reservation was allegedly violated by the grantee, would not entitle the grantor to partition the property under this section [Code 1942, § 961]. Hall v. Scott, 201 Miss. 540, 29 So. 2d 640, 1947 Miss. LEXIS 417 (Miss. 1947).

Under will devising land to wife and son to share and share alike with provision that if son should die before reaching the age of twenty-one his share should go to the heirs of testator's body then living, widow was entitled to partition of a one-half interest therein in fee simple absolute, and the remaining half interest would be set aside under the partition in the same legal aspect and with the same incidents as attached under the will, without adjudicating the rights of parties who may ultimately become vested with an unqualified fee thereto. Lynch v. Lynch, 198 Miss. 479, 23 So. 2d 263, 1945 Miss. LEXIS 217 (Miss. 1945).

Where trusts under a will directing trustees to pay annuity to decedent's widow during her life, to care for an uncle until death and burial, and to divide estate among designated beneficiaries upon liquidation, had not been terminated and the trustees were still in possession, one of the designated beneficiaries was neither a tenant in common nor in possession, nor had the right to possession, and consequently could not maintain a suit to partition lands comprising part of the estate. Yeates v. Box, 198 Miss. 602, 22 So. 2d 411, 1945 Miss. LEXIS 232 (Miss. 1945).

Bill by one of several designated beneficiaries seeking partition of lands comprising part of the estate, under will directing trustees to pay an annuity to decedent's widow during her lifetime, to care for an uncle until death and burial, and to divide the estate among designated beneficiaries upon liquidation, where the trust had not been terminated and the trustees were still in possession, was multifarious insofar as the trustees were concerned, inasmuch as the trustees were not interested in the partition. Yeates v. Box, 198 Miss. 602, 22 So. 2d 411, 1945 Miss. LEXIS 232 (Miss. 1945).

Persons owning undivided interests in the minerals in land, the surface of which was owned by one of such persons, were tenants in common of a joint interest in a freehold within the meaning of this section [Code 1942, § 961]. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

One of the ingredients of a cotenant's title to minerals is the speculative chance which is an acknowledged asset of ownership. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

Where one of several persons owned the surface to land and half the undivided minerals underlying it and the other half of the undivided interest in the minerals was owned by the others, and upon action for partition by sale of the mineral interests the offer was made to combine the interests of the latter into a single unit for the purpose of division in kind, division in kind was feasible where any division so effected would result in the allotment of units of a size to be usable or merchantable. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

Undivided interests of several persons in minerals underlying land were capable of division in kind, and it was reversible error to hold that it could only be partitioned by sale. Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So. 2d 196, 1944 Miss. LEXIS 336 (Miss. 1944).

Where testator devised residue of his estate to his widow and minor son, with the provision that if such son should die before he reached 21 years of age, his share should be divided among the heirs of testator's body then living, partition in kind of various interests in certain lands owned by testator at the time of his death would not violate the "reversion and remainder" provision of this section [Code 1942, § 961], since the widow and her son are tenants in common in possession during the period of his minority, and if he should live beyond 21 years they would be tenants in common of the fee in possession, and if he should die before that time, the heirs of the body of the testator then living would be tenants in common with the widow, there being no right of reversion or remainder involved. Lynch v. Lynch, 196 Miss. 276, 17 So. 2d 195, 1944 Miss. LEXIS 186 (Miss. 1944).

Where a trustee under a trust in favor of an incompetent tenant in common was to expend as much of the income and principal as was necessary for the support and maintenance of the incompetent, and was empowered to sell the undivided interest of the incompetent during his lifetime, such trust did not provide for a life estate only, so as to preclude a partition sale without the trustee's consent; and the other tenants in common were entitled to have the property sold in its entirety in view of demurrers admitting that the property was not subject to partition in kind. Beard v. Rosenzweig, 190 Miss. 325, 200 So. 261, 1941 Miss. LEXIS 56 (Miss. 1941).

Under this section [Code 1942, § 961] the heirs of the owner of a half interest in land were entitled to a partition of the property which they inherited from such owner, notwithstanding that a co-owner died leaving a widow and children in occupation of the property, since the exemption from partition under Code of 1930, § 1412, applied only to the interest in the property of the deceased co-owner owned by him at the time of his death. Solomon v. Solomon, 187 Miss. 22, 192 So. 10, 1939 Miss. LEXIS 86 (Miss. 1939).

Tenants in common of clay, oil and mineral deposits may have interest partitioned, by sale for division of proceeds. Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739, 1927 Miss. LEXIS 72 (Miss. 1927).

Minor with right of redemption from tax sale may in partition have interest sold if necessary to raise funds for redemption. Cuevas v. Cuevas, 145 Miss. 456, 110 So. 865, 1927 Miss. LEXIS 132 (Miss. 1927).

Right to bring partition suit depends on complainant's title and not weakness of defendant's title. Mallory v. Walton, 119 Miss. 396, 81 So. 113, 1919 Miss. LEXIS 14 (Miss. 1919).

Beneficiaries under testamentary trust entitled to partition where death of trustee had extinguished power to sell. Chandler v. Chandler, 111 Miss. 525, 71 So. 811, 1916 Miss. LEXIS 333 (Miss. 1916).

Heirs of tenant in common may sue for partition of land, including right of way of railroad. Hill v. Woodward, 100 Miss. 879, 57 So. 294, 1911 Miss. LEXIS 89 (Miss. 1911).

Defendant in partition claiming half interest as partner of complainant in whose name title stands, need not make payment into court where he offers to pay for his interest. Peirce v. Halsell, 90 Miss. 171, 43 So. 83, 1907 Miss. LEXIS 43 (Miss. 1907).

Without showing title complainant cannot succeed. Goff v. Cole, 71 Miss. 46, 13 So. 870, 1893 Miss. LEXIS 140 (Miss. 1893).

It is not essential to the right of partition that the co-tenants should have equal estates. All that is necessary is that they shall be co-tenants of what is to be partitioned. Black v. Washington, 65 Miss. 60, 3 So. 140, 1887 Miss. LEXIS 15 (Miss. 1887); Lynch v. Lynch, 196 Miss. 276, 17 So. 2d 195, 1944 Miss. LEXIS 186 (Miss. 1944).

The owner in fee simple of one part of a tract of land and of a reversion in the other part, in which other part another person owns a particular estate, the two parts being ascertained, is not entitled to a partition. Belew v. Jones, 56 Miss. 342, 1879 Miss. LEXIS 126 (Miss. 1879).

3. Lands of decedent.

Partition of land of deceased person may be had during pendency of administration of his estate and prior to expiration of period for probating of claims, as possession, or right of possession, in tenants in common gives absolute and unconditional right to partition, and sufficiency or insufficiency of personal property to pay debts due by estate is immaterial, although lands remain liable for debts, if any, which personal property is insufficient to pay. Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58, 1949 Miss. LEXIS 311 (Miss. 1949).

Land descended to the heirs of a decedent as tenants in common under this section [Code 1942, § 961] may be partitioned before the estate of the decedent is fully administered or the debts against it probated or paid. Garrett v. Colvin, 77 Miss. 408, 26 So. 963, 1899 Miss. LEXIS 64 (Miss. 1899).

In a proceeding to partition the lands of a decedent and to recover against executors de son tort the rights of the parties in interest should be established as to both the real and personal property per stirpes and not per capita. Weaver v. Williams, 75 Miss. 945, 23 So. 649, 1898 Miss. LEXIS 45 (Miss. 1898).

4. Lands subject to encumbrance, homestead or dower interest.

Upon remarriage of a widow, her rights under § 91-1-23, which prevents partition of homestead property, are terminated and the entire property becomes subject to partition by any and all of the other joint owners. Cheeks v. Herrington, 523 So. 2d 1033, 1988 Miss. LEXIS 211 (Miss. 1988).

In view of the provisions of §§ 11-21-3, 93-3-1 and 93-3-3, § 89-1-29 did not preclude a wife, who held real property as joint tenant with husband from whom she was separated but not divorced, from maintaining an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. Trigg v. Trigg, 498 So. 2d 334, 1986 Miss. LEXIS 2779 (Miss. 1986).

A wife, who held real property as joint tenant with husband from whom she was separated but not divorced, could maintain an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. Trigg v. Trigg, 498 So. 2d 334, 1986 Miss. LEXIS 2779 (Miss. 1986).

A divorced husband had no right to partition of the former marital residence where the divorce decree had awarded to the wife the exclusive use and possession of the property involved while she remained unmarried. Sartin v. Sartin, 405 So. 2d 84, 1981 Miss. LEXIS 2230 (Miss. 1981).

Where property is subject to partition during the lives of cotenants-husbands, the right to partition is not enjoined by the deaths of the cotenants-husbands and the survival of their wives; however, the widows should retain their houses as improvements on the land, if possible, or, in the alternative, if it is not feasible to partition the land to allow the widows to receive their respective houses as improvements, then an accounting should be had as to such improvements. Carter v. Brewton, 396 So. 2d 617, 1981 Miss. LEXIS 2055 (Miss. 1981).

In a proceeding under § 11-21-3 for partition of certain real estate and farm lands owned by the petitioner and her former husband as joint tenants, with the right of survivorship, the chancery court erred in dismissing the petition where the divorce decree made no attempt to grant to either party an estate for life or for years or any other estate or title in derogation or diminuition of the title already vested in them respectively as joint tenants. The provision in the decree that the husband might farm a portion of the land was ineffectual to deprive the petitioner of her vested interest or to restrict the exercise of her rights with respect to the same;

§ 27-33-3, which provides for the exemption of homesteads from certain taxes, does not affect the right of a cotenant or tenant in common to partite property commonly or jointly owned. Welborn v. Welborn, 386 So. 2d 722, 1980 Miss. LEXIS 2054 (Miss. 1980).

Where the former husband lost his right to occupy the marital home under a divorce decree giving the wife the right to exclusive use of the home, the husband lost his homestead rights under Code 1972 §§ 27-33-3 & 85-3-21, so that the husband thus held no homestead exemption on the property which could be used to defeat the former wife's right to partition under Code 1972 § 11-21-3; the existence of homestead rights in the former wife was irrelevant, since she waived them by bringing a suit for partition sale. Blackmon v. Blackmon, 350 So. 2d 44, 1977 Miss. LEXIS 2207 (Miss. 1977).

This section [Code 1942, § 961] was inapplicable where a widow of a landowner, who had died intestate leaving also a son and daughter, neither waived nor attempted to dispose of her rights by deed conveying her one-third interest therein to her son, reserving to herself a life estate in all the lands. Gresham v. Clark, 231 Miss. 206, 95 So. 2d 234, 1957 Miss. LEXIS 506 (Miss. 1957).

Decree confirming sale in partition of homestead land in which widow had a life estate should, on her objection, be vacated and cause dismissed. Talley v. Talley, 108 Miss. 84, 66 So. 328, 1914 Miss. LEXIS 172 (Miss. 1914).

Incumbrance on land does not prevent partition. Doran v. Beale, 106 Miss. 305, 63 So. 647, 1913 Miss. LEXIS 135 (Miss. 1913).

Children cannot have partition of exempt property of deceased father while occupied or used by widow, nor an accounting for the use. Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66, 1906 Miss. LEXIS 167 (Miss. 1906).

But the fact that dower has never been set apart will not wholly prevent partition; under a prayer for general relief the court will first set off the dower and then partition the balance of the tract. Davis v. Patty, 76 Miss. 753, 25 So. 662, 1899 Miss. LEXIS 13 (Miss. 1899).

There can be no valid partition or sale of land for division of proceeds under this section [Code 1942, § 961] while there exists an outstanding unassigned dower interest in the same. Gilleylen v. Martin, 73 Miss. 695, 19 So. 482, 1896 Miss. LEXIS 189 (Miss. 1896); Ligon v. Spencer, 58 Miss. 37, 1880 Miss. LEXIS 88 (Miss. 1880); Fox v. Coon, 64 Miss. 465, 1 So. 629, 1886 Miss. LEXIS 91 (Miss. 1886); Wood v. Bryant, 68 Miss. 198, 8 So. 518, 1890 Miss. LEXIS 50 (Miss. 1890).

5. Jurisdiction and venue.

The court has jurisdiction in a suit to determine rights in the proceeds of property paid into the registry of the chancery court upon its purchase by the state, and to adjust the equities of the parties arising out of use and occupation, payment of taxes and cost of upkeep. Moorer v. Willis, 239 Miss. 118, 121 So. 2d 127, 1960 Miss. LEXIS 273 (Miss. 1960).

The chancery court has no jurisdiction of a petition to sell land for partition of proceeds of sale as to land described in the petition, order of sale and notice of sale, in which the petitioners have no interest whatsoever, and are not therefore tenants in common with the adjoining owners as to the surplus lands sought to be sold with their own land. Coers v. Williams, 221 Miss. 706, 74 So. 2d 836, 1954 Miss. LEXIS 583 (Miss. 1954).

Recital in decree that all parties interested in partition are made parties by proper process is conclusive of jurisdiction of court. Sweatman v. Dean, 86 Miss. 641, 38 So. 231, 1905 Miss. LEXIS 16 (Miss. 1905).

In partition suits, the venue is determined alone by this section [Code 1942, § 961].It is restrictive of the general statute on the subject of venue in chancery. This is true even if a sale be demanded. Nugent & McWillie v. Powell, 63 Miss. 99, 1885 Miss. LEXIS 23 (Miss. 1885).

RESEARCH REFERENCES

ALR.

Necessity and sufficiency of pleading in partition action to authorize incidental relief. 11 A.L.R.2d 1449.

Contractual provisions as affecting right to judicial partition. 37 A.L.R.3d 962.

Right to partition of overriding royalty interest in oil and gas leasehold. 58 A.L.R.3d 1052.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty. 92 A.L.R.3d 473.

Homestead Right of Cotenant as Affecting Partition. 83 A.L.R.6th 605.

Am. Jur.

59A Am. Jur. 2d, Partition §§ 27 et seq.

CJS.

68 C.J.S., Partition §§ 82 et seq.

Law Reviews.

1981 Mississippi Supreme Court Review – Property. 52 Miss. L. J. 463, June 1982.

§ 11-21-5. Parties to proceedings for partition.

Any of the parties in interest, whether infants or adults, may institute proceedings for the partition of lands or for a partition sale thereof, by judgment of court as herein provided. All persons in interest must be made parties except (a) in cases where a part of the freehold is owned by persons owning a life estate therein or a life tenancy therein subject to the rights of remaindermen or reversioners, then, in such event, it shall only be necessary that the person or persons owning or claiming a life estate or life tenancy therein be made parties; and (b) in cases where the partition is for the surface of the land only, it shall not be necessary that persons owning divided or undivided interests in the minerals in the land be made parties unless such persons also have an interest in the surface of the land. An infant, or person of unsound mind, may sue by next friend as in other cases; but if the infant, or non compos mentis, have a guardian, the guardian must appear as next friend, unless good cause to the contrary be shown. Where an infant or non compos is made a party defendant, the guardian, if any, of such infant or non compos shall also be made a party, whether the infant or non compos be resident or nonresident and whether the guardian be a resident or a nonresident; and the said guardian may appear and answer the complaint. The summons to the defendants, including the guardian aforesaid, shall be made pursuant to the Mississippi Rules of Civil Procedure. The word "guardian," where used in this section, shall be held to apply also to all persons who, under the laws of any other state or country, stand in that relation whether known as curator, tutor, committee or conservator, or by whatever other name or title such person may be known.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2 (1); 1857, ch. 36, art. 48; 1871, § 1814; 1880, §§ 2556, 2557; 1892, § 3098; 1906, § 3522; Hemingway's 1917, § 2834; 1930, § 2921; 1942, § 962; Laws, 1918, ch. 130; Laws, 1946, ch. 317, § 2; Laws, 1983, ch. 378, § 1; Laws, 1991, ch. 573, § 49, eff from and after July 1, 1991.

Editor's Notes — Laws of 1983, ch. 378, § 2, effective from and after July 1, 1983, provides as follows:

"SECTION 2. Nothing contained in this act shall be construed to affect any decree relating to the partition of land entered prior to the effective date of this act."

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Executors or administrators.
3. Suing by next friend.

1. In general.

Chancery court properly partitioned the property at issue because accommodations appeared to have been made for the fair distribution of property between the three partited owners and the remaining cotenants, there was substantial evidence in the record to justify the chancellor's division of the property, the complaint explained the interests devised in the will, the calculations, which were not in dispute, showed every descendant and devisee received their fair portion of the property according to the decedent's will and the laws of intestate succession, and the statutory requirement of proof of title was fulfilled. Kohnke v. Tate, 270 So. 3d 1076, 2018 Miss. App. LEXIS 499 (Miss. Ct. App. 2018).

Where decedent died intestate, and the surviving children entered into an agreement effectively creating a life estate for one sibling who remained on the farm, the trial court properly (1) applied contract interpretation rules, (2) found that the intent of the agreement was not to limit restraint on alienation only to time of execution of contract, and (3) held that the agreement was not an unreasonable restraint on alienation; thus, plaintiff's partition action was dismissed. In re Estate of Harris v. Harris, 840 So. 2d 742, 2003 Miss. App. LEXIS 188 (Miss. Ct. App. 2003).

Former wife seeking judicial partition of property was denied partition action because she was unable to show her interest in property, where record title made husband sole grantee, deed naming wife as grantee contained erroneous description, and grantors in deed naming wife had no interest in land at time of alleged quit claim deed, thus vesting no interest in wife; additionally, adverse possession was not shown. Davis v. Davis, 508 So. 2d 1062, 1987 Miss. LEXIS 2527 (Miss. 1987).

In a suit to remove a cloud on title to land and for damages for slander of title, a defendant who had joined in a prayer for partition, and had consented to a partition decree, and who stated in open court that he was agreeable to the partition, was estopped to make any claim of title whatsoever to the lands involved in the partition. Phelps v. Clinkscales, 247 So. 2d 819, 1971 Miss. LEXIS 1458 (Miss. 1971).

Prior to the 1946 amendment, partition was a possessory proceeding only, and the court could not adjudicate rights of owners of future interests. Hemphill v. Mississippi State Highway Com., 245 Miss. 33, 145 So. 2d 455, 1962 Miss. LEXIS 529 (Miss. 1962).

Owners of future interests are subject to partition if made parties defendant by persons having possessory estates; and unborn takers of future interests are reached by virtual representation. Hemphill v. Mississippi State Highway Com., 245 Miss. 33, 145 So. 2d 455, 1962 Miss. LEXIS 529 (Miss. 1962).

Husband of tenant in common owning undivided interest in land occupied by them as homestead is neither a necessary or proper party to suit for partition of land, and there is no need for any service of process upon him before issuance of writ of assistance on behalf of purchaser of land. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744, 1948 Miss. LEXIS 381 (Miss. 1948).

The provisions in this section [Code 1942, § 962], requiring that all known living persons in interest be made parties, and the doctrine of virtual representation as to unborn contingent remaindermen constitute a workable plan which protects the constitutional rights of all parties and yet admits of present enjoyment and disposition of fee simple owners of property in common with others owning a lesser interest therein. Copeland v. West, 202 Miss. 106, 30 So. 2d 610, 1947 Miss. LEXIS 246 (Miss. 1947).

The very purpose of the amendment to the statute (Laws 1946, chapter 317, § 2) was to require that known living contingent remaindermen be made parties to the proceeding. Copeland v. West, 202 Miss. 106, 30 So. 2d 610, 1947 Miss. LEXIS 246 (Miss. 1947).

Contingent remaindermen are not bound by the proceedings unless made parties. Copeland v. West, 202 Miss. 106, 30 So. 2d 610, 1947 Miss. LEXIS 246 (Miss. 1947).

Court should have refused to proceed under bill for partition where all necessary parties to complete final decree were not before him. Wilson v. Wilson, 166 Miss. 369, 146 So. 855, 1933 Miss. LEXIS 358 (Miss. 1933).

Guardian ad litem of infant defendant in partition should not be made commissioner to make sale. Ponder v. Martin, 119 Miss. 156, 80 So. 388, 1918 Miss. LEXIS 11 (Miss. 1918).

Instrument combining contract for services of attorney, power of attorney, and security for the fee for services in securing property for an heir, did not entitle attorney to bring suit for partition against heir. Wright v. Bowers, 112 Miss. 516, 73 So. 568, 1916 Miss. LEXIS 140 (Miss. 1916).

Partition must be between joint-tenants, tenants in common or coparceners. White v. Lefoldt, 78 Miss. 173, 28 So. 818, 1900 Miss. LEXIS 87 (Miss. 1900).

All persons interested in the property should be made parties to a partition suit. Millsaps v. Shotwell, 76 Miss. 923, 25 So. 359, 1899 Miss. LEXIS 2 (Miss. 1899).

The tenant in dower was held entitled to a partition of the land owned by her deceased husband in co-tenancy, to enable her to have her dower assigned in his part. Hill v. Gregory, 56 Miss. 341, 1879 Miss. LEXIS 125 (Miss. 1879).

2. Executors or administrators.

Executor cannot sue to partition estate. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193, 1907 Miss. LEXIS 11 (Miss. 1907).

Where executor made residuary devisee, and widow renounced will and took undivided one-half interest in land, they became tenants in common entitling executor to sue for partition. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193, 1907 Miss. LEXIS 11 (Miss. 1907).

3. Suing by next friend.

A minor is not competent during minority to waive the requirement that he must sue by next friend. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

There is no discretion in the court to dispense with the requirement that a minor must sue by next friend when it is expressly imposed by statute in the particular proceeding, and particularly so when the estate and interests of minors are so seriously concerned as in a partition of their real property. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

A minor may not act as next friend to another minor. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

A minor whose disability of minority has been specially removed to the extent of dealing with her own property could not act as next friend to other minors in an ex parte judicial partition of their real property. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

Where the record in an ex parte judicial partition showed that minor parties therein were represented by a next friend who was also a minor, the decree therein was subject to collateral attack. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

Fraud between next friend of minors in partition suit and commissioner appointed to make sale and purchaser at sale is good cause for setting aside decree after minor comes of age; and any cause for setting aside decree between adults during term, and any cause calling for a reversal would amount to good cause for setting aside partition sale after infant comes of age. Dendy v. Commercial Bank & Trust Co., 143 Miss. 56, 108 So. 274, 1926 Miss. LEXIS 243 (Miss. 1926).

Grandfather who was next friend of plaintiff in partition suit, by purchasing the land at the commissioner's sale, obtained a defective title apparent on the record and all parties claiming through him are chargeable with notice thereof. Memphis Stone & Gravel Co. v. Archer, 120 Miss. 453, 82 So. 315, 1919 Miss. LEXIS 107 (Miss. 1919).

Duty of next friend is to protect rights of ward throughout partition suit and to prevent confirmation of sale if it violates or prejudices ward's rights. Memphis Stone & Gravel Co. v. Archer, 120 Miss. 453, 82 So. 315, 1919 Miss. LEXIS 107 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Spouse of living co-owner as party to partition action. 57 A.L.R.2d 1166.

Partition action where United States or state owns undivided interest in property. 59 A.L.R.2d 937.

Am. Jur.

51 Am. Jur. 2d, Life Tenants and Remaindermen §§ 14, 15, 104.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 1 (Petition or application by guardian of cotenant for order authorizing guardian's consent to proposed partition of land by cotenants of ward).

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 3 (Order for hearing on guardian's petition for leave to consent to partition of land and directing notice thereof).

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 41 et seq. Judicial partition of estates of decedents, minors, and incompetent persons.

CJS.

68 C.J.S., Partition §§ 91 et seq.

§ 11-21-7. Proceedings same as in other cases; when ex parte petitions may be heard.

Except as otherwise provided herein, the proceedings for partition shall be instituted and conducted as other suits in chancery; and all ex parte petitions may be heard and determined by the chancellor in term time or in vacation.

HISTORY: Codes, 1871, § 1815; 1880, § 2558; 1892, § 3099; 1906, § 3523; Hemingway's 1917, § 2835; 1930, § 2922; 1942, § 963; Laws, 1960, ch. 224.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant in partition proceeding cannot claim for partition without filing and serving pleading stating claim and requesting relief from cross-defendant, as well as from original plaintiff. Johnson v. Franklin, 481 So. 2d 812, 1985 Miss. LEXIS 2331 (Miss. 1985).

Partition proceedings are conducted in accordance with Mississippi Rules of Civil Procedure. Johnson v. Franklin, 481 So. 2d 812, 1985 Miss. LEXIS 2331 (Miss. 1985).

In suit for partition of real property, bill alleging complainant owns undivided interest in the property under a will sufficiently shows that he holds as tenant in common and that tenants in common are in possession, or have right of possession, and bill is sufficient in substance to support decree of partition, since Code 1942, § 1284, only requires bill to contain statement of facts on which complainant seeks relief in ordinary and concise language. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908, 1949 Miss. LEXIS 439 (Miss. 1949).

The court has the power and duty in

partition proceedings to adjudicate and adjust all the equities between the parties and to that end a cross bill is available when necessary, to be dealt with as in other suits in chancery. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

Where the vendee of one of the parties to a judicial partition alleged and prayed in its cross bill to an action to declare such partition void because of the minority of some of the parties thereto, that the partition was valid, or, if not, that the minors had ratified it by their subsequent partition of the remainder of the land in pais, or, if mistaken therein, the vendee, as assignee, was entitled to its vendor's undivided interest in the entire property and a partition thereof, and prayed for general relief, such allegations and prayer were sufficient to present and require action by the court as respects the vendee's alternate contention. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

RESEARCH REFERENCES

ALR.

Burden of proof in partition suit as regards alleged prior voluntary partition of property. 1 A.L.R.2d 473.

Necessity and sufficiency of pleading in partition action to authorize incidental relief. 11 A.L.R.2d 1449.

Am. Jur.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 11 et seq. (Judicial partition of real property).

§ 11-21-9. Controverted title and all equities disposed of.

If the title of the plaintiffs seeking partition or sale of land for a division shall be controverted, it shall not be necessary for the court to dismiss the complaint, but the question of title shall be tried and determined in the suit and the court shall have power to determine all questions of title, and to remove all clouds upon the title, if any, of the lands whereof partition is sought and to apportion encumbrances, if partition be made of land encumbered and it be deemed proper to do so. The court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of encumbrancers.

HISTORY: Codes, 1871, § 1817; 1880, § 2576; 1892, § 3101; 1906, § 3525; Hemingway's 1917, § 2837; 1930, § 2923; 1942, § 964; Laws, 1991, ch. 573, § 50, eff from and after July 1, 1991.

Cross References — Power of the chancery courts to confirm and quiet titles, generally, see § 11-17-29.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Rights of parties.
3. Title issue waived.

1. Generally.

Chancellor's decision to partition the home was not an abuse of discretion, as the wife had paid the mortgage, taxes, and insurance on the home for the previous 12 years, the husband received the benefit of the appreciation of equity, and the husband did not provide any alternatives to the findings of the chancellor. Coleman v.

Coleman, 196 So. 3d 1050, 2016 Miss. App. LEXIS 12 (Miss. Ct. App.), cert. denied, 202 So. 3d 614, 2016 Miss. LEXIS 306 (Miss. 2016).

Award of the entire purchase price of a home to one of the unmarried joint tenants (JT1) was appropriate given that the chancellor could adjust the equities and determine the claims of the joint tenants and the fact that JT1 had paid the entire purchase price for the home along with the cost of all utilities, insurance, club dues, and taxes while JT2 had paid nothing. Jones v. Graphia, 95 So. 3d 751, 2012 Miss. App. LEXIS 493 (Miss. Ct. App. 2012).

Judicial estoppel precludes former wife from challenging former husband's title to real property jointly owned by them where, in prior divorce litigation, wife swore that she and husband each owned one-half interest in property. Daughtrey v. Daughtrey, 474 So. 2d 598, 1985 Miss. LEXIS 2454 (Miss. 1985).

In a suit by a cotenant, against a cotenant, for accounting of proceeds received upon sale of timber, where in a previous partition suit the liability of cotenant to account was not adjudicated, although under the statute it could have been adjudicated, the decree in the partition suit was not res judicata. Van Zandt v. Van Zandt, 227 Miss. 528, 86 So. 2d 466, 1956 Miss. LEXIS 722 (Miss. 1956).

The court has the power and duty in partition proceedings to adjudicate and adjust all the equities between the parties and to that end a cross bill is available when necessary, to be dealt with as in other suits in chancery. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents and improvements, subsequent money decree adjudicating equities between parties held "final decree," appeal from which brought up for review all preliminary and interlocutory decree, including decrees confirming report of commissioners on partition. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

Encumbrance on land will not prevent partition. Doran v. Beale, 106 Miss. 305, 63 So. 647, 1913 Miss. LEXIS 135 (Miss. 1913).

It is proper for the court in partition to decide all equities arising from a payment of a lien and taxes and a claim for use and occupation by one of the co-tenants. Walker v. Williams, 84 Miss. 392, 36 So. 450, 1904 Miss. LEXIS 52 (Miss. 1904).

Chancellor may determine complainant's title as against life tenant and remainderman and award partition against only life tenant. Walker v. Williams, 84 Miss. 392, 36 So. 450, 1904 Miss. LEXIS 52 (Miss. 1904).

Under this section [Code 1942, § 964] the court has jurisdiction to adjudicate all conflicting claims or controversies between those properly joined as parties. This is true even where a defendant alleged to be a cotenant denies that he is such and asserts an adverse title in himself. Claughton v. Claughton, 70 Miss. 384, 12 So. 340, 1892 Miss. LEXIS 121 (Miss. 1892); Nugent & McWillie v. Powell, 63 Miss. 99, 1885 Miss. LEXIS 23 (Miss. 1885).

The statute does not extend to controversies other than between co-tenants. Strangers asserting adverse claims cannot be brought into the suit for partition and their titles canceled as clouds. Nugent & McWillie v. Powell, 63 Miss. 99, 1885 Miss. LEXIS 23 (Miss. 1885); Cooper v. Fox, 67 Miss. 237, 7 So. 342, 1889 Miss. LEXIS 76 (Miss. 1889).

2. Rights of parties.

Chancery court did not err in determining a sister was not entitled to recover a setoff for rent on a home she co-owned with her brother in which the brother lived because the sister had not previously sought rent from her brother when she was not living in the house, but the brother was entitled to a setoff for the house expenses the sister had not paid after she moved out; the sister had paid house expenses from the time she acquired the home with her brother until she moved out. Stennis v. Stennis, 109 So. 3d 1107, 2013 Miss. App. LEXIS 111 (Miss. Ct. App. 2013).

Where real property had approximately 300 co-tenants and the property was partitioned by sale, it was not error to approve a contract of sale to a purchasing co-tenant and to split the proceeds from the sale in proportionate shares to the owners of the property. Cathey v. McPhail & Assocs., 989 So. 2d 494, 2008 Miss. App. LEXIS 514 (Miss. Ct. App. 2008).

Where the chancellor abused his discretion in attempting to fashion a unique remedy to sever a cotenancy by ignoring statutes of the state defining the only lawful method available to accomplish that purpose, the co-tenant seeking partition was entitled to one-half the sale proceeds increased by $198 for various adjustments for such matters as repairs, improvements, taxes, and mortgage payments. Murphree v. Cook, 822 So. 2d 1092, 2002 Miss. App. LEXIS 180 (Miss. Ct. App. 2002).

Because the chancellor in a partition action elected to assess the tenant-in-possession with one-half the rent value of the property for her occupancy of the co-tenant's undivided one-half interest in it, the chancellor in effect called on the tenant-in-possession to pay for her exclusive use of the property; therefore, the co-tenant could not receive the full rent value of his half interest in the property while, at the same time, forcing the tenant-in-possession to pay the normal expenses of operating and maintaining the property. Murphree v. Cook, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

In partition proceedings it is admissible to seek an account for rents against cotenants in possession. Jefcoat v. Powell, 235 Miss. 291, 108 So. 2d 868, 1959 Miss. LEXIS 429 (Miss. 1959).

Where vendee of one of the parties to a judicial partition alleged in its cross bill to an action to declare such partition void because of minority of some of the parties thereto, that the partition was valid, or, if not, that the minor parties thereto had ratified it by their subsequent partition of the remainder of the land in pais, or, if mistaken therein, the vendee, as assignee, was entitled to its vendor's undivided interest in the entire property and a partition thereof, and prayed for general relief, such allegations and prayer were sufficient to present and require action by the court as respects the alternate contention of the vendee. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

In partition suit, purchaser from cotenant who bought common property at trustee's sale should be allowed sum received by co-tenant for timber and expended by him in discharging encumbrances against common property. Gilchrist Fordney Co. v. Ezelle, 141 Miss. 124, 106 So. 269, 1925 Miss. LEXIS 220 (Miss. 1925).

Jury trial in partition where complainant's title is denied by cross-bill is discretionary and not a right. Bland v. Bland, 105 Miss. 478, 62 So. 641, 1913 Miss. LEXIS 233 (Miss. 1913).

The right of a tenant in common upon partition to charge the interest of his cotenant with what may be due on an accounting as to receipts and disbursements concerning the common estate, does not entitle him to priority over a bona fide encumbrancer of the interest of such co-tenant. Burns v. Dreyfus, 69 Miss. 211, 11 So. 107, 1891 Miss. LEXIS 93 (Miss. 1891); Morgan v. Long, 73 Miss. 406, 19 So. 98, 1895 Miss. LEXIS 130 (Miss. 1895).

A defendant who has not entered under a common claim of title, can defeat a partition suit by showing an outstanding title in a stranger to the suit. Cooper v. Fox, 67 Miss. 237, 7 So. 342, 1889 Miss. LEXIS 76 (Miss. 1889).

3. Title issue waived.

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085, 2009 Miss. App. LEXIS 102 (Miss. Ct. App. 2009).

RESEARCH REFERENCES

CJS.

68 C.J.S., Partition §§ 56–59.

§ 11-21-11. Court may order sale in first instance.

If, upon hearing, the court be of the opinion that a sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made, it shall order a sale of the lands, or such part thereof as may be deemed proper, and a division of the proceeds among the cotenants according to their respective interests. The court may appoint a master to make the sale, and may make all proper orders to protect the rights of the parties interested. The court may order the sale of a part of the land and the partition in kind of the residue.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

HISTORY: Codes, 1871, § 1829; 1880, § 2559; 1892, § 3100; 1906, § 3524; Hemingway's 1917, § 2836; 1930, § 2924; 1942, § 965; Laws, 1958, ch. 251; Laws, 1984, ch. 437, § 1; Laws, 1991, ch. 573, § 51, eff from and after July 1, 1991.

Cross References — Sale of land upon commissioner's report, see § 11-21-27.

Where a person entitled to a distributive share of a deceased's estate may compel distribution, see § 91-7-303.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Construction.
3. Burden of proof.
4. Consent of parties.
5. Appointment of commissioner to make sale.
6. Miscellaneous.

1. Generally.

Trial court was presented with affirmative proof that a partition by sale under Miss. Code Ann. § 11-21-11 was in the best interests of the parties and thus the trial court did not err by ordering the property to be sold and dividing the proceeds equally between appellants and appellee as co-tenants; an expert on real estate appraisals testified that it was his opinion that the properties were to be sold rather than being partitioned in kind, the court found no error in the appraisal of the properties and believed that the trial court did not abuse its discretion in relying on the report, and the trial court did not rely solely on the appraisal, but also considered the parties' recommendations and did not abuse its discretion in assigning more weight to the expert's opinion. Georgian v. Harrington, 990 So. 2d 813, 2008 Miss. App. LEXIS 561 (Miss. Ct. App. 2008).

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss.

Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15. Dunaway v. Morgan, 918 So. 2d 872, 2006 Miss. App. LEXIS 9 (Miss. Ct. App. 2006).

Trial court properly ordered that commercial property be sold instead of partited in kind where property was not subject to partition in kind due to configuration of seven buildings thereon and by virtue the parties' strained relationship after purchasing the property, but appellate court reemphasized a preference for partition in kind when practicable. Fuller v. Chimento, 824 So. 2d 599, 2002 Miss. LEXIS 225 (Miss. 2002).

Chancellor, who ordered a co-tenant to be divested of his interest in the property at a price calculated using such factors as the original cost, the subsequent expenses of maintaining and operating the property, and a fair rental factor based on the fact that one tenant was out of possession during the entire period of joint ownership, erred, since the right of partition created by statute is an absolute right of a tenant in common; thus, an attempt by a chancellor to fashion an alternate means of ending a cotenancy which he deemed more equitable under the particular facts was an error as a matter of law. The court however found no reversible error in the manner in which the chancellor computed the property values and adjusted the equities, so these could be used if the property were to be partitioned on remand. Murphree v. Cook, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

A chancellor erred in ordering a petition of property by sale, rather than the legally preferable partition in kind, where there was no substantial proof that a sale would better promote the interests of the parties or that an equal partition in kind would be impracticable. Shaw v. Shaw, 603 So. 2d 287, 1992 Miss. LEXIS 325 (Miss. 1992).

Tenant in common who filed answer to complaint for partition alleging affirmatively that property could not be divided in kind, but who failed to adhere to the prerequisites of Mississippi Code § 11-21-11, could not prevail on appeal where the record, which contained nothing to support his brief of errors, showed scrupulous adherence by the chancery court and chancellor in vacation to the law and partition statutes. Vinson v. Johnson, 493 So. 2d 947, 1986 Miss. LEXIS 2581 (Miss. 1986).

A sale of land cannot be decreed unless it has been shown that an equal partition in kind cannot be made. Monaghan v. Wagner, 487 So. 2d 815, 1986 Miss. LEXIS 2443 (Miss. 1986).

When house jointly owned by former husband and former wife is ordered sold, wife is not entitled to be allowed to purchase land in question under affordable terms and conditions. Daughtrey v. Daughtrey, 474 So. 2d 598, 1985 Miss. LEXIS 2454 (Miss. 1985).

Hardship is not defense to right of partition. Daughtrey v. Daughtrey, 474 So. 2d 598, 1985 Miss. LEXIS 2454 (Miss. 1985).

Where there is nothing in the record to indicate that it would be to the best interest of all of the parties to sell the property rather than partition it in kind, the sale of the property should not be ordered. Mathis v. Quick, 271 So. 2d 924, 1973 Miss. LEXIS 1527 (Miss. 1973).

In the absence of evidence that a sale will better promote the interests of the parties or an equal division in kind cannot be made, a sale should not be ordered. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

This section [Code 1942, § 965] affords authority for ordering partition in kind to a cotenant desirous thereof, providing owelty if necessary, and a sale of the remainder with division of the proceeds. Carter v. Ford, 241 Miss. 511, 130 So. 2d 852, 1961 Miss. LEXIS 368 (Miss. 1961).

In determining whether sale and division of proceeds should be ordered instead of partition in kind, the cost of partition in kind, while a consideration, is not controlling. Carter v. Ford, 241 Miss. 511, 130 So. 2d 852, 1961 Miss. LEXIS 368 (Miss. 1961).

In determining whether to order division in kind rather than a sale, the widow's election against the will does not warrant disregard of its provisions as to the shares of other beneficiaries. Jefcoat v. Powell, 235 Miss. 291, 108 So. 2d 868, 1959 Miss. LEXIS 429 (Miss. 1959).

Before court can order sale of lands for division of proceeds of sale under this section [Code 1942, § 965], court must be of opinion that sale of the lands, or any part thereof, will better promote interest of all parties than partition in kind, or that equal division cannot be made. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908, 1949 Miss. LEXIS 439 (Miss. 1949).

Where a trustee under a trust in favor of an incompetent tenant in common was to expend as much of the income and as much of the principal as was necessary for the support and maintenance of the incompetent, and was empowered to sell the undivided interest of the incompetent during his lifetime, such trust did not provide for a life estate only, so as to preclude a partition sale without the trustee's consent; and the other tenants in common were entitled to have the property sold in its entirety in view of demurrers admitting that the property was not subject to partition in kind. Beard v. Rosenzweig, 190 Miss. 325, 200 So. 261, 1941 Miss. LEXIS 56 (Miss. 1941).

Sale for division of proceeds not ordered unless lands not susceptible of partition in kind. Hilbun v. Hilbun, 134 Miss. 235, 98 So. 593, 1924 Miss. LEXIS 251 (Miss. 1924).

Sale of land for partition ordered only where it will better promote interest of parties, or where division in kind cannot be made. Smith v. Stansel, 93 Miss. 69, 46 So. 538, 1908 Miss. LEXIS 94 (Miss. 1908).

Where the terms of a decree directing a sale in partition were not complied with, and the purchase-money was not paid, and the note for the deferred payments was not given, and no commissioner's deed was executed in pursuance of the sale, the sale was void and passed no title out of the owners. Liverman v. Lee, 86 Miss. 370, 38 So. 658, 1905 Miss. LEXIS 69 (Miss. 1905).

Where a bidder at a void sale, under a decree for partition, made a payment to the owners or satisfied a tax lien on the land, he should be repaid out of the proceeds of a sale under a decree in a subsequent suit for partition. Liverman v. Lee, 86 Miss. 370, 38 So. 658, 1905 Miss. LEXIS 69 (Miss. 1905).

A decree directing partition of land is interlocutory and may be modified or vacated by the court at any time before the final decree, the one confirming the partition, is rendered. Sweatman v. Dean, 86 Miss. 641, 38 So. 231, 1905 Miss. LEXIS 16 (Miss. 1905).

Title in the purchaser under a chancery proceeding for the sale of lands for a partition of proceeds, which cannot be collaterally attacked, is shown as against the parties to the suit by offering in evidence the bill for partition, process issued and served in the cause, with decree and report of sale and decree of confirmation of sale. Sweatman v. Dean, 86 Miss. 641, 38 So. 231, 1905 Miss. LEXIS 16 (Miss. 1905).

A decree for the sale of lands for division of the proceeds among tenants in common is void after rendition upon proof of publication only, without the precedent affidavit required by statute to authorize such service of process. Moore v. Summerville, 80 Miss. 323, 31 So. 793, 1902 Miss. LEXIS 256 (Miss. 1902).

A sale should not be decreed in partition unless the petition alleges, or the proof shows the existence of one of the statutory requisites therefor. Tindall v. Tindall, 3 So. 581 (Miss. 1888).

A sale will not be ordered where the parties are not entitled to a partition in kind. Pankey v. Howard, 47 Miss. 83, 1872 Miss. LEXIS 52 (Miss. 1872).

2. Construction.

The statute providing for the sale of land for division of proceeds among tenants in common is an innovation on the common law and must be strictly pursued. Cox v. Kyle, 75 Miss. 667, 23 So. 518, 1898 Miss. LEXIS 31 (Miss. 1898).

3. Burden of proof.

Tenant in common seeking a partition by sale has the burden of proving his case comes under the prerequisite statutory provision for ordering a sale as opposed to division in kind. Vinson v. Johnson, 493 So. 2d 947, 1986 Miss. LEXIS 2581 (Miss. 1986).

The trial court erred in finding that a 170-acre tract of timber land was not subject to partition in kind and in ordering its sale where, of the eight heirs-at-law, only one favored the sale, and where such heir did not put on any evidence as to why the property could not be divided or why the interests of all the parties would be better met by a sale; while it was true that the court-appointed commissioners had concluded that the land was not susceptible to division in kind, they failed to give any substantial reasons, based upon a recital of facts found by them to exist, why it could not be done, and the facts recited fell far short of showing that the best interests of all parties would best be served by sale. Nor was the cost of partition in kind controlling, even though the commissioners reported that it would necessitate nine or more surveys at approximately $300 per survey, as well as nine or more appraisals at an approximate cost of $200 to $500 per parcel. Bailey v. Vaughn, 375 So. 2d 1054, 1979 Miss. LEXIS 2472 (Miss. 1979).

Plaintiffs seeking a partition failed to carry their burden of proving clearly that a division could not be made in kind, where defendants owned four ninths interest and were willing to accept their land as a unit. Burley v. Kuykendall, 349 So. 2d 1036, 1977 Miss. LEXIS 2175 (Miss. 1977).

One seeking partition by sale must bring his case clearly within the statute. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

Joint owner seeking partition of realty by sale of premises has burden to establish that lands were not susceptible of partition in kind. Hilbun v. Hilbun, 134 Miss. 235, 98 So. 593, 1924 Miss. LEXIS 251 (Miss. 1924); Hogue v. Armstrong, 159 Miss. 875, 132 So. 446, 1931 Miss. LEXIS 65 (Miss. 1931).

4. Consent of parties.

The court properly ordered a partition by sale where all of the parties agreed to a sale of the property and the consent order specifically stated that the property was not capable of partition in kind in a fair and equitable manner for various enumerated reasons. Dunn v. BL Dev. Corp., 747 So. 2d 284, 1999 Miss. App. LEXIS 478 (Miss. Ct. App. 1999).

A partition by sale is improperly ordered over the objection of one owning 69% of one parcel and 84 ½ % of the other. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

Court has no authority to order sale over co-tenant's protest unless it is clear that division in kind cannot be made, or sale would promote best interests of all parties. Shorter v. Lesser, 98 Miss. 706, 54 So. 155, 1910 Miss. LEXIS 112 (Miss. 1910).

A decree ordering the sale of property owned in common for division of the proceeds cannot rightfully direct the sale of other property owned exclusively by one of the parties without the consent of all the parties. White v. Lefoldt, 78 Miss. 173, 28 So. 818, 1900 Miss. LEXIS 87 (Miss. 1900).

5. Appointment of commissioner to make sale.

Guardian ad litem in partition suit should not be made commissioner to make sale. Ponder v. Martin, 119 Miss. 156, 80 So. 388, 1918 Miss. LEXIS 11 (Miss. 1918).

A decree directing a partition of land if it can be equitably done, and, if not, that the commissioners appointed to make the sale shall report accordingly to the next term of court, is not a final decree, but an interlocutory decree from which no appeal lies. Gilleylen v. Martin, 73 Miss. 695, 19 So. 482, 1896 Miss. LEXIS 189 (Miss. 1896).

6. Miscellaneous.

In a case in which a married couple held a shared interest in the subject property, the trial court committed reversible error when it found that the omission of the husband from the initial complaint did not result in prejudice to the couple. The husband was not properly noticed or added as a party defendant until a year after the matter was initiated. Morton v. Quinn, 206 So. 3d 1265, 2016 Miss. App. LEXIS 809 (Miss. Ct. App. 2016).

When a shareholder sought a family corporation's judicial dissolution in chancery court, a decree awarding the shareholder an in-kind division of the corporation's land was not unauthorized, even after siblings invoked their right to purchase the shareholder's shares, because Miss. Code Ann. § 79-4-14.34(i) said nothing in Miss. Code Ann. § 79-4-14.34 diminished the chancellor's equity powers to fashion an alternate remedy. Rainbow Ranch, Inc. v. Hardin (In re Will of Hardin), 158 So. 3d 341, 2014 Miss. App. LEXIS 401 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 120 (Miss. 2015).

Neither Miss. Code Ann. § 11-21-11, nor its companion Miss. Code Ann. § 11-21-27, mandates that an appraisal must be obtained prior to selling partitioned land, but rather, in both statutes, the trial court may cause an appraisal to be made of the property; so clearly chancellors are vested with discretionary authority over whether to require an appraisal. Pride v. Pride, 60 So. 3d 208, 2011 Miss. App. LEXIS 190 (Miss. Ct. App. 2011).

Siblings waived any objection to the chancery court's failure to require that an appraisal take place before the auction of a homesite because they never raised the issue of appraisal in the chancery court; the parties stipulated on the record to the procedure for partition by sale, and the chancellor adopted the procedure requested by the parties. Pride v. Pride, 60 So. 3d 208, 2011 Miss. App. LEXIS 190 (Miss. Ct. App. 2011).

Siblings argument that the chancery court erred by not following the requirements of Miss. Code Ann. § 11-21-11 in ordering the sale of a homesite was procedurally barred because the siblings made absolutely no protest; the siblings neither objected to the commissioners' report recommending a partition in kind of the land nor to the chancery court's decision to partition the homesite by sale, and in their reply brief, they conceded that they agreed with the decision to partition the homesite by sale. Pride v. Pride, 60 So. 3d 208, 2011 Miss. App. LEXIS 190 (Miss. Ct. App. 2011).

In a partition action, the chancery court did not abuse its discretion in ordering that the property be sold and that the proceeds from the sale be divided equally among the parties because appellant received a copy of the appraisal, was aware of the time and place of the public sale, and was aware of the right to appear and bid on the property. Polk v. Jones, 20 So. 3d 710, 2009 Miss. App. LEXIS 191 (Miss. Ct. App. 2009).

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085, 2009 Miss. App. LEXIS 102 (Miss. Ct. App. 2009).

Where real property had approximately 300 co-tenants, it was not error to order the partition by sale of the property, rather than partition in kind, because (1) the property had different types of terrain, (2) the property lacked access, (3) there were a large number of individual interests, and (4) there was no way to cover existing expenses other than by sale of the property. Cathey v. McPhail & Assocs., 989 So. 2d 494, 2008 Miss. App. LEXIS 514 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition §§ 70 et seq.

19 Am. Jur. Pl and Pr Forms (Rev), Partition, Forms 181 et seq. (Interlocutory judgments and orders for sale in partition).

CJS.

68 C.J.S., Partition §§ 179 et seq.

Law Reviews.

1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-21-13. Partition without masters; owelty.

If, at the hearing, it appear that the intervention of masters is unnecessary to secure an equal partition in kind, or that the same can be effected by providing owelty, and that it would best promote the interest of the parties, the court may order the partition and fix the amount to be paid by one (1) or several cotenants to another or others; or this may be done on hearing the report of the master.

HISTORY: Codes, 1892, § 3102; 1906, § 3526; Hemingway's 1917, § 2838; 1930, § 2925; 1942, § 966; Laws, 1958, ch. 252; Laws, 1991, ch. 573, § 52, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

The court in its discretion may order a sale of only a part of the lands sought to be partited. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

Where tenants in common, holding unequal undivided interests, went into separate possession of respective shares in 1918 under alleged oral partition, and improved land, chancery court, in partition suit in 1928, held required to make effort to allot improved lands to their improvers, without accounting, but, if that was impractical and new partition was necessary, accounting should be had as to such improvements. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

Where tenants in common, holding unequal undivided interests, went into exclusive and separate possession of respective shares under alleged oral partition in 1918, and one cultivated land in businesslike manner, while others neglected theirs, they were estopped, in partition suit in 1928, to claim rent from one another, and no accounting for rents was due. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition §§ 44 et seq.

CJS.

68 C.J.S., Partition § 144.

§ 11-21-15. Judgment appointing masters.

If the judgment is for a partition of the land, it shall state the number of shares into which the land is to be divided, and shall appoint not more than three (3) discreet freeholders, not related to the parties by consanguinity or affinity, to make partition according to the judgment. Either party may object to any master for cause, and, in case the objection is sustained, the place shall be filled by another appointment. If any vacancy occurs among the masters, the chancellor may fill the vacancy at any time by written appointment.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2 (2); 1857, ch. 36, art. 51; 1871, § 1819; 1880, §§ 2560, 2561; 1892, § 3103; 1906, § 3327; Hemingway's 1917, § 2839; 1930, § 2926; 1942, § 967; Laws, 1958, ch. 259; Laws, 1991, ch. 573, § 53; Laws, 2014, ch. 413, § 1, eff from and after July 1, 2014.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss. Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15 and the sale here was conducted pursuant to Miss. Code Ann. 11-21-11. Dunaway v. Morgan, 918 So. 2d 872, 2006 Miss. App. LEXIS 9 (Miss. Ct. App. 2006).

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition §§ 64, 65, 68.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 112 (Order appointing commissioners or referees to partition land).

CJS.

68 C.J.S., Partition §§ 155, 156.

§ 11-21-17. Oath of special commissioners.

Before the special commissioners enter upon the discharge of their duties, they shall take and subscribe an oath before some competent officer, that they will honestly, faithfully and impartially make the partition decreed, and perform the duties required of them to the best of their skill, knowledge and judgment.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2 (3); 1857, ch. 36, art. 52; 1871, § 1822; 1880, § 2562; 1892, § 3104; 1906, § 3528; Hemingway's 1917, § 2840; 1930, § 2927; 1942, § 968; Laws, 1958, ch. 258.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Oath.

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss. Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15. Dunaway v. Morgan, 918 So. 2d 872, 2006 Miss. App. LEXIS 9 (Miss. Ct. App. 2006).

RESEARCH REFERENCES

Am. Jur.
59A Am. Jur. 2d, Partition § 64.

CJS.
68 C.J.S., Partition §§ 155, 156.

§ 11-21-19. Survey made and division into shares.

The special commissioners shall, if deemed advisable, cause a survey to be made of the lands to be divided, in their presence, and shall divide the same into the number of parts or shares directed in the order containing their appointment, each part or share to contain one or more lots, as the special commissioners may think proper, having regard to the situation, quantity, quality and advantages of each part or share, so that they may be equal in value as nearly as may be, or according to the respective rights of the parties. If the bounds or title of any tract be controverted and the controverted part be valuable, the special commissioners shall separate it from the part not controverted, and make a partition of the tract or tracts in such manner that a portion of the controverted part may be allotted to each share, as well as a portion of the part not controverted. The special commissioners, or any one of them, previous to the survey, if any, shall administer an oath to the surveyors and chain bearers that they will honestly and impartially perform their respective duties.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2 (4); 1857, ch. 36, art. 53; 1871, § 1823; 1880, § 2563; 1892, § 3105; 1906, § 3529; Hemingway's 1917, § 2841; 1930, § 2928; 1942, § 969; Laws, 1958, ch. 249.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR.
Necessary and proper parties to suit or proceeding to establish private boundary line. 73 A.L.R.3d 948.

§ 11-21-21. Allotment of shares by ballot.

The special commissioners, if the same have not been done by the surveyor, shall make a plat of land to be divided; shall make true field notes, specifying the metes and bounds of the several shares, and of each parcel of each share which contains more than one parcel; and the several shares and parcels of shares shall be distinctly designated on the plat and numbered from one progressively, and the same number shall designate the several parcels of one share; and they shall allot the several shares in the following manner: The special commissioners shall publicly number as many tickets as there are shares marked on the plat, and put the tickets into a hat or box, and the names of the persons entitled to shares shall be written on separate tickets and put into another hat or box, when a person appointed for that purpose by the special commissioners shall proceed to draw a ticket of those containing the names, and then a ticket of the numbers, and so proceed until the whole are drawn; and the number which shall be drawn to the name of any cotenant shall be his separate share in the land so divided. The special commissioners shall make certificate of the balloting, signed by them, specifying the time, place and manner thereof, and the allotment of shares.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2(6); 1857, ch. 36, art. 54; 1871, § 1824; 1880, § 2534; 1892, § 3106; 1906, § 3530; Hemingway's 1917, § 2842; 1930, § 2929; 1942, § 970; Laws, 1958, ch. 250.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where one cotenant had cleared land amounting to his share and remainder was wild land, cleared land should be allotted to him. Bennett v. Bennett, 84 Miss. 493, 36 So. 452, 1904 Miss. LEXIS 53 (Miss. 1904).

RESEARCH REFERENCES

ALR.

Judicial partition of land by lot or chance. 32 A.L.R.4th 909.

§ 11-21-23. Assignment of shares and owelty.

Instead of making an allotment of shares by ballot, the special commissioners may assign shares to the parties entitled, if so directed by the court or chancellor, or if they find it desirable, and in any case, if an equal partition in kind cannot be made otherwise, or so advantageously, the special commissioners may assess the amount of money to be paid by one or more of the cotenants to another or others, so as to equalize their respective shares.

HISTORY: Codes, 1871, § 2567; 1880, § 2564; 1892, § 3107; 1906, § 3531; Hemingway's 1917, § 2843; 1930, § 2930; 1942, § 971; Laws, 1958, ch. 244.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where tenants in common, holding unequal undivided interests, went into exclusive and separate possession of respective shares under alleged oral partition in 1918, and one cultivated land in businesslike manner, while others neglected theirs, they were estopped, in partition suit in 1928, to claim rents from one another, and no accounting for rents was due. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

Where tenants in common, holding unequal undivided interests, went into separate possession of respective shares in 1918 under alleged oral partition, and improved land, chancery court, in partition suit in 1928, held required to make effort to allot improved lands to their improvers, without accounting, but, if that was impractical and new partition was necessary, accounting should be had as to such improvements. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

RESEARCH REFERENCES

Am. Jur.
59A Am. Jur. 2d, Partition § 67.

CJS.
68 C.J.S., Partition §§ 159-163.

§ 11-21-25. Report of special commissioners.

The special commissioners shall make to the court, at the first term held after they have acted, or else as the court shall direct, a full report, in writing, of their proceedings, which, on exceptions filed at any time before its confirmation, for good cause shown may be set aside by the court, and other special commissioners appointed, or the same special commissioners may be directed to make a new partition; or the partition may be modified by the court in any particular, and be confirmed as thus modified.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2(8); 1857, ch. 36, art. 55; 1871, § 1825; 1880, § 2565; 1892, § 3108; 1906, § 3532; Hemingway's 1917, § 2844; 1930, § 2931; 1942, § 972; Laws, 1958, ch. 254.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Due process.

1. In general.

Nothing in Miss. Code Ann. § 11-21-25 mandated conducting a hearing on objections to the special commissioners' report. Miles v. Miles, 949 So. 2d 774, 2006 Miss. App. LEXIS 507 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

In a long, complicated dispute among decedent's eight heirs as to how to divide decedent's 50 acres of property, the chancellor did not err in rejecting the special commissioner's third report, and in modifying the commissioner's fourth and final report. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052, 2004 Miss. App. LEXIS 695 (Miss. Ct. App. 2004).

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents and improvements, subsequent money decree adjudicating equities between parties held "final decree," appeal from which brought up for review all preliminary and interlocutory decrees, including decree confirming report of commissioners on partition. Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

2. Due process.

Chancellor did not violate the owners' due process rights by accepting a special master's amended report and recommendation without conducting a hearing because the chancellor was not statutorily required to conduct a hearing on the merits of the partition action, the owners never filed an objection to either of the master's reports, the owners failed to appear at the hearings on the reports that were noticed to the parties, the amended report was consistent with the requests the parties made in their pleadings, and the owners were conveyed the 12-acre parcel they requested. Sims v. Mathis, 192 So. 3d 1109, 2016 Miss. App. LEXIS 335 (Miss. Ct. App. 2016).

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition § 68.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 123-127 (Report by commissioners or referees).

CJS.

68 C.J.S., Partition §§ 164-168.

§ 11-21-27. Land sold when not capable of division.

If, after a judgment for partition and the appointment of masters, it shall appear from the report of the masters, or on exceptions to their report, that a just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants, the court shall order a sale of the land, or such part thereof as may be deemed proper, and a division of the proceeds among those interested, as provided for.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

HISTORY: Codes, 1857, ch. 36, art. 59; 1871, § 1829; 1880, § 2566; 1892, § 3111; 1906, § 3535; Hemingway's 1917, § 2847; 1930, § 2932; 1942, § 973; Laws, 1958, ch. 246; Laws, 1984, ch. 437, § 2; Laws, 1991, ch. 573, § 54, eff from and after July 1, 1991.

Cross References — Discretion of court to order the sale of land where this will best serve the interests of the parties, see § 11-21-11.

How sale of property shall be made when ordered by a justice of the peace, see § 11-21-79.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Appraisal.

Siblings waived any objection to the chancery court's failure to require that an appraisal take place before the auction of a homesite because they never raised the issue of appraisal in the chancery court; the parties stipulated on the record to the procedure for partition by sale, and the chancellor adopted the procedure requested by the parties. Pride v. Pride, 60 So. 3d 208, 2011 Miss. App. LEXIS 190 (Miss. Ct. App. 2011).

Neither Miss. Code Ann. § 11-21-11, nor its companion Miss. Code Ann. § 11-21-27, mandates that an appraisal must be obtained prior to selling partitioned land, but rather, in both statutes, the trial court may cause an appraisal to be made of the property; so clearly chancellors are vested with discretionary authority over whether to require an appraisal. Pride v. Pride, 60 So. 3d 208, 2011 Miss. App. LEXIS 190 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition §§ 70 et seq.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 129 (Writ to sheriff for sale of property after report that partition in kind is impracticable).

CJS.

68 C.J.S., Partition §§ 179 et seq.

§ 11-21-29. Compensation of masters.

The court in which the cause is pending, or the chancellor or judge thereof in vacation, shall fix and allow reasonable compensation for each of the masters, and such compensation shall be taxed and collected as costs in the suit.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2(9); 1857, ch. 36, art. 57; 1871, § 1840; 1880, § 2575; 1892, § 3109; 1906, § 3533; Hemingway's 1917, § 2845; 1930, § 2933; 1942, § 974; Laws, 1928, ch. 299; Laws, 1960, ch. 225; Laws, 1991, ch. 573, § 55, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-21-31. Attorney's fees.

In all cases of the partition or sale of property for division of proceeds, the court may allow a reasonable attorney's fee to the attorney or the plaintiff, to be taxed as a common charge on all the interests, and to be paid out of the proceeds in case of a sale, and to be a lien on the several parts in case of partition.

HISTORY: Codes, 1880, § 2577; 1892, § 3119; 1906, § 3542; Hemingway's 1917, § 2854; 1930, § 2934; 1942, § 975; Laws, 1991, ch. 573, § 56, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Effect of controversy between parties.
2. Allowance to defendant's solicitor.
3. Miscellaneous.

1. Effect of controversy between parties.

Although the trial judge in a partition suit has the authority to award attorney's fees to the attorney or to the complainant to be taxed as a common charge on all interests, pursuant to § 11-21-31, such authority is usually not allowed when the partition suit is resisted and the defendant employs an attorney in good faith to represent his or her interest. O'Neill v. O'Neill, 551 So. 2d 228, 1989 Miss. LEXIS 425 (Miss. 1989).

This section is intended primarily to allow a fee to the solicitor who conducts a partition suit without resistance, and it should not be allowed if the party opposing partition has presented a real defense, nor should attorney's fees be awarded until partition in kind or sale for division of proceeds has been completed and approved by the court; this section is discretionary and not mandatory. Blackmon v. Blackmon, 350 So. 2d 44, 1977 Miss. LEXIS 2207 (Miss. 1977).

This statute relates to the allowance of a fee to the solicitor in an uncontested suit; and such fee should not be allowed where there is a real controversy and it is proper that defendants be represented by counsel of their own choosing-especially so where a defendant is successful in part. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

Where defendant was successful in part through his initiative and effort of his counsel, in securing relief asked in his answer, it was error to charge him with any part of fee of complainant's attorney. Billingsley v. Billingsley, 114 Miss. 702, 75 So. 547, 1917 Miss. LEXIS 81 (Miss. 1917).

Thus, where defendants assert a hostile title to a part of the land it is error as against them to allow a fee which includes services in cancelling such claim, as well as services in the partition. Neblett v. Neblett, 70 Miss. 572, 12 So. 598, 1893 Miss. LEXIS 17 (Miss. 1893); Hoffman v. Smith, 61 Miss. 544, 1884 Miss. LEXIS 126 (Miss. 1884).

Primarily the statute is intended to give a fee to the solicitor who conducts the suit without resistance, but it is not so limited. Hoffman v. Smith, 61 Miss. 544, 1884 Miss. LEXIS 126 (Miss. 1884).

When there is a real controversy, and a propriety in defendants being represented by counsel of their own, the fee should not be allowed. Hoffman v. Smith, 61 Miss. 544, 1884 Miss. LEXIS 126 (Miss. 1884); Walker v. Williams, 84 Miss. 392, 36 So. 450, 1904 Miss. LEXIS 52 (Miss. 1904); Hardy v. Richards, 103 Miss. 548, 60 So. 643, 1912 Miss. LEXIS 198 (Miss. 1912); Carpenter v. Carpenter, 104 Miss. 403, 61 So. 421, 1913 Miss. LEXIS 39 (Miss. 1913); Brower v. Rosenbaum & Little, 125 Miss. 87, 87 So. 130, 1921 Miss. LEXIS 92 (Miss. 1921).

2. Allowance to defendant's solicitor.

Where a defendant employs his own attorney in good faith to represent his interest or to assert his position in a controversy during a partition proceeding, he should not be required to contribute to the fee of complainants' attorney. Walker v. Davis, 309 So. 2d 853, 1975 Miss. LEXIS 1893 (Miss. 1975).

This section [Code 1942, § 975] does not warrant allowance of more than one fee. Smith v. Stansel, 93 Miss. 69, 46 So. 538, 1908 Miss. LEXIS 94 (Miss. 1908).

The section [Code 1942, § 975] does not allow a fee to the solicitor of defendant who has filed an answer and cross-bill opposing a sale, and demanding partition in kind. Potts v. Gray, 60 Miss. 57, 1882 Miss. LEXIS 9 (Miss. 1882).

3. Miscellaneous.

Because the chancery court's order for the marital house to be sold was part of the equitable distribution, the partition statutes had no applicability, and a husband was not entitled to attorney's fees under the statute. Pierce v. Pierce, 132 So. 3d 553, 2014 Miss. LEXIS 122 (Miss. 2014).

In a partition action, the chancellor's award of attorney's fees payable by the appealing parties, and assessed against the sale proceeds, was error, as there was no evidence that said fees were reasonable and there was no bad faith shown. Further, as to notice of the sale, Miss. Code Ann. § 13-3-163 did not apply where the chancellor gave specific instruction for terms of the sale pursuant to Miss. Code Ann. §§ 11-5-93 and 11-5-95, and while the sale price was low, the chancellor did not abuse his discretion in refusing to set aside the sale. Necaise v. Ladner, 910 So. 2d 699, 2005 Miss. App. LEXIS 194 (Miss. Ct. App. 2005).

The intent of the legislature as expressed in this section [Code 1942, § 975] was to give the court the option, in its discretion, of allowing a reasonable solicitor's fee to the solicitor for the complainant only after a partition in kind had been completed, or a sale of the property for division of the proceeds had been consummated, for the benefit of all the owners, and that only then could the court allow a fee and tax it as a common charge on all the interests. Herrington v. Dennis, 204 So. 2d 440, 1967 Miss. LEXIS 1192 (Miss. 1967).

One of the most important duties and responsibilities devolving upon the solicitor for the complainant in a partition suit is to see that summons for nonresident defendants are legally correct and complete. Herrington v. Dennis, 204 So. 2d 440, 1967 Miss. LEXIS 1192 (Miss. 1967).

Where the only services performed by the solicitor for the complainant was to initiate the action for a partition (which complainant later desired to dismiss), he was not entitled to intervene in the partition suit for the purpose of having the court determine a reasonable fee for his services, nor was he entitled to a lien on the property to be partitioned, or upon the undivided interest therein of his client. Herrington v. Dennis, 204 So. 2d 440, 1967 Miss. LEXIS 1192 (Miss. 1967).

Instrument combining contract for services of attorney, power of attorney, and security for fee in securing property for heir did not entitle attorney to bring partition suit against heir. Wright v. Bowers, 112 Miss. 516, 73 So. 568, 1916 Miss. LEXIS 140 (Miss. 1916).

Decree erroneously making fee of complainant's solicitor common charge on all the land will not be reversed as to defendant appealing where she previously signed agreement that decree might be carried into effect, nor as to defendant not appealing. Carpenter v. Carpenter, 104 Miss. 403, 61 So. 421, 1913 Miss. LEXIS 39 (Miss. 1913).

Where the sale is void complainants are not entitled to credit for attorney's fees and court costs, payable out of the proceeds of a valid sale in a subsequent suit. Liverman v. Lee, 86 Miss. 370, 38 So. 658, 1905 Miss. LEXIS 69 (Miss. 1905).

RESEARCH REFERENCES

ALR.
Allowance and apportionment of counsel fees in suit for partition. 94 A.L.R.2d 575.

Am. Jur.
59A Am. Jur. 2d, Partition §§ 80 et seq.

CJS.
68 C.J.S., Partition §§ 230, 231, 234, 235 et seq.

§ 11-21-33. Owelty a lien.

In all cases where owelty is allowed, it shall be a lien upon the share of the party charged therewith, which shall be superior to all other liens made or suffered by such party.

HISTORY: Codes, 1880, § 2567; 1892, § 3110; 1906, § 3534; Hemingway's 1917, § 2846; 1930, § 2935; 1942, § 976.

Cross References — Rule that lien created by cotenant shall remain in effect only as to that cotenant's share after partition, see § 11-21-39.

When property is not exempt from execution, see § 85-3-47.

Concurrence of liens for erecting, altering, or repairing the same structure, see § 85-7-263.

Preference given to mortgage for purchase-money of land, see § 89-1-45.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.
Because the chancellor in partition action elected to assess the tenant-in-possession with one-half the rent value of the property for her occupancy of the co-tenant's undivided one-half interest in the property, the chancellor in effect called on the tenant-in-possession to pay for her

exclusive use of the property; therefore, the co-tenant could not receive the full rent value of his half interest in the property while, at the same time, forcing the tenant-in-possession to pay the normal expenses of operating and maintaining the property. Accordingly, in a partition in kind, the portion set apart to the tenant-in-possession could be subjected to a charge in the nature of owelty to secure the payment resulting from the adjustments. Murphree v. Cook, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

§ 11-21-35. Final judgment and judgment confirming partition.

The final judgment of the chancery court in partition proceedings shall ascertain and settle the rights of all parties; and it, and the judgment confirming the partition, shall constitute an instrument of evidence in all questions as to the title of the lands which may be the subject of the judgment, in all courts, and shall be conclusive as to the rights of all parties to the suit, and subject to motions and other post trial review, as in other suits, and to a repartition as provided.

HISTORY: Codes, 1871, § 1828; 1880, § 2568; 1892, § 3112; 1906, § 3536; Hemingway's 1917, § 2848; 1930, § 2936; 1942, § 977; Laws, 1991, ch. 573, § 57, eff from and after July 1, 1991.

Cross References — Rule that a decree of chancery court shall have effect of judgment in circuit court, see § 11-5-79.

Reports to chancellor of sale or partition of land, see § 11-5-107.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Conclusiveness and validity.
3. Bill of review.

1. In general.

In a suit to set aside a final decree confirming a sale of land by a special commissioner for division of proceeds in a partition suit, the trial court erred in sustaining both a special demurrer raising the affirmative defenses of limitations of actions, laches and bona fide purchaser for value, and a motion to dismiss raising the affirmative defenses of res judicata, laches and estoppel, where none of the facts upon which the special demurrer and motion to dismiss could dependably rest had been averred in the complaint. Complainants' affirmative allegations that one or more of them had been in possession since the sale and that none of them had accepted the proceeds of the partition sale also raised a question of fact to be determined upon proof. Mosby v. Gandy, 375 So. 2d 1024, 1979 Miss. LEXIS 2470 (Miss. 1979).

Where the record in a partition suit wholly failed to show that the property sold for a grossly inadequate price, and there was no proof that the trial court did not permit appellant's testimony to be presented at the time of the final report of the special commissioner, the trial court's decree of partition was affirmed. Legg v. Legg, 251 Miss. 12, 168 So. 2d 58, 1964 Miss. LEXIS 322 (Miss. 1964).

Bill which is sufficient in substance and contains prayer for general relief in addition to special prayer that property be sold for partition is sufficient to support decree for partition in kind. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908, 1949 Miss. LEXIS 439 (Miss. 1949).

The repartition mentioned in this statute is that provided by Code 1942, § 982, which is limited to one year next after the first partition. Kittrell v. O'Flynn, 203 Miss. 164, 33 So. 2d 628, 1948 Miss. LEXIS 245 (Miss. 1948).

Duty of next friend to protect rights of ward throughout partition suit and to prevent confirmation if sale violates or prejudices rights of ward. Memphis Stone & Gravel Co. v. Archer, 120 Miss. 453, 82 So. 315, 1919 Miss. LEXIS 107 (Miss. 1919).

Defective bond to prevent confirmation cured by Code 1906, § 1022. Little v. Cammack, 109 Miss. 753, 69 So. 594, 1915 Miss. LEXIS 222 (Miss. 1915).

Damages to first purchaser not adjudicated in proceeding to prevent confirmation and for resale. Little v. Cammack, 109 Miss. 753, 69 So. 594, 1915 Miss. LEXIS 222 (Miss. 1915).

On dismissing intervening petition against confirmation, petitioner not being party, it was error to confirm sale and adjudicate her rights. Talley v. Talley, 108 Miss. 84, 66 So. 328, 1914 Miss. LEXIS 172 (Miss. 1914).

Price paid at partition sale does not belong to tenants in common until sale confirmed. Bank of Hickory v. McPherson, 102 Miss. 852, 59 So. 934, 1912 Miss. LEXIS 129 (Miss. 1912) but see Collier v. Trustmark Nat'l Bank, 678 So. 2d 693, 1996 Miss. LEXIS 412 (Miss. 1996).

In suit for partition and accounting, resale of tenant's share proper where he failed to pay rent found to be collected by him. George v. Woods, 94 Miss. 268, 49 So. 147 (Miss. 1908).

Defendants in partition suit may assert title to proceeds of interest awarded codefendant against his garnishing creditor. Shuler v. Murphy, 91 Miss. 518, 44 So. 810, 1907 Miss. LEXIS 145 (Miss. 1907).

Where allowance for rent is excessive case will be reversed. Bowles v. Wood, 90 Miss. 742, 44 So. 169, 1907 Miss. LEXIS 116 (Miss. 1907).

Where defendants seek to have a cause treated as a pending one because of an erroneous description of land in what had been regarded for years as a final decree in a partition suit and the complainant asks that if it be so treated the cause be dismissed, the defendants cannot complain of a decree dismissing it without prejudice to their right to bring any other suit they may see proper. Farmer v. Allen, 85 Miss. 672, 38 So. 38, 1904 Miss. LEXIS 181 (Miss. 1904).

2. Conclusiveness and validity.

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents, etc., subsequent money decree adjudicating equities between parties, held "final decree." Butler v. Furr, 168 Miss. 884, 152 So. 277, 1934 Miss. LEXIS 366 (Miss. 1934).

A decree confirming an amicable partition of land is invalid which ignores the rights of a joint owner who was a defendant to the partition proceeding and did not assent to the allotment agreed upon by the other parties. Cotton v. Cash, 85 Miss. 29, 37 So. 459, 1904 Miss. LEXIS 128 (Miss. 1904).

A decree for the sale of land for partition which fixes the interest of the parties is conclusive as to such interest as between the parties and their privies, although the decree is never executed by a valid sale of the land. Alsobrook v. Eggleston, 69 Miss. 833, 13 So. 850, 1892 Miss. LEXIS 47 (Miss. 1892).

3. Bill of review.

A bill of review is the proper way to attack a partition deed to one who was the next friend of infant parties. Welch v. Parker, 242 Miss. 331, 135 So. 2d 851, 1961 Miss. LEXIS 563 (Miss. 1961).

Review of a decree is barred by limitations where not sought within two years after the person seeking review reached majority. Welch v. Parker, 242 Miss. 331, 135 So. 2d 851, 1961 Miss. LEXIS 563 (Miss. 1961).

No leave of court is necessary to file a bill of review for error apparent on face of record. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744, 1948 Miss. LEXIS 381 (Miss. 1948).

Petition for leave to file bill of review based upon newly discovered evidence must show by facts that no want of reasonable diligence in discovering evidence is to be imputed to petitioner and all inferences of want of diligence must be rebutted by complete statement of facts in that regard. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744, 1948 Miss. LEXIS 381 (Miss. 1948).

Demurrer to petition for leave to file bill of review based upon newly discovered evidence is correctly sustained when alleged newly discovered evidence was known to court at time decree complained of was executed and was incorporated into provisions of that decree. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744, 1948 Miss. LEXIS 381 (Miss. 1948).

A bill in equity seeking to review the proceedings and decrees in a partition suit should set forth the interests of all the parties, join all the parties to the original suit or show the facts justifying their nonjoinder; and show the facts justifying the joinder of persons not parties to the original suit if any be joined. Barber v. Armistead, 82 Miss. 788, 35 So. 199 (Miss. 1903).

Code 1892, § 3122, denying an action to recover property sold under a chancery decree after two years from date of possession taken by the purchaser, does not debar a minor interested in lands sold under partition proceedings from filing a bill of review at any time within two years after coming of age. Partition proceedings are governed by an independent chapter of the Code, to which § 3122 has no application. Such a bill may be filed within the time limited by § 3111. Martin v. Gilleyler, 70 Miss. 324, 12 So. 254 (Miss. 1892).

RESEARCH REFERENCES

ALR.

Basis of computation of cotenants' accountability for minerals and timber removed from the property. 5 A.L.R.2d 1368.

Am. Jur.

59A Am. Jur. 2d, Partition §§ 53.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 191 et seq. (Proceedings, orders, and judgments after partition or sale in partition).

CJS.

68 C.J.S., Partition § 118.

§ 11-21-37. Recording of judgments.

Judgments making partition shall be recorded in the record book of conveyances of the county or district in which any of the lands are situated, within three (3) months after the partition is confirmed; and a partition, the judgment making which is not so deposited with the clerk for record, shall not be valid as against purchasers without notice, or against creditors.

HISTORY: Codes, 1871, § 1828; 1880, § 2569; 1892, § 3113; 1906, § 3537; Hemingway's 1917, § 2849; 1930, § 2937; 1942, § 978; Laws, 1991, ch. 573, § 58, eff from and after July 1, 1991.

Cross References — Creation of a lien on land sold on credit pursuant to an order of the chancery court, see § 11-5-97.

Rule that a decree cannot be assailed collaterally except for fraud, see § 91-1-31.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-21-39. Lien created by party binding on his share.

Any mortgage or other lien executed by any joint tenant, tenant in common, or coparcener, shall remain in force on the share of such cotenant after partition, and on his share only; but this shall not prevent the holder of such mortgage or other lien from asserting claim to owelty awarded to such cotenant.

HISTORY: Codes, 1857, ch. 36, art. 62; 1871, § 1836; 1880, § 2572; 1892, § 3115; 1906, § 3539; Hemingway's 1917, § 2851; 1930, § 2938; 1942, § 979.

Cross References — Rule that owelty shall be a lien upon the share of the party charged therewith, see § 11-21-33.

Concurrence of liens for erecting, altering, or repairing the same structure, see § 85-7-263.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.

59A Am. Jur. 2d, Partition § 95.

CJS.

68 C.J.S., Partition § 240.

§ 11-21-41. Paramount rights not affected.

Nothing herein contained shall be construed so as to injure, prejudice, defeat or destroy the estate, right, or title of any person claiming a tract of land, or any part thereof, or any piece or lot of land by title under any other person, or title paramount to the title of the joint tenants, tenants in common, or coparceners, among whom partition may have been made.

HISTORY: Codes, Hutchinson's 1848, ch. 42, art. 2(14); 1857, ch. 36, art. 64; 1871, § 1838; 1880, § 2573; 1892, § 3117; 1906, § 3540; Hemingway's 1917, § 2852; 1930, § 2939; 1942, § 980.

Cross References — Rule that the priority of all instruments is controlled by the date of filing for record, see § 89-5-5.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Right to partition.

As the owner of an undivided interest in the fee simple estate, the corporation had a legal right to partite the property in kind and to file its complaint, and the partition in kind of the property would not have affected the landowner's rights or the corporation's duties under the lease by virtue of Miss. Code Ann. § 11-21-41; therefore, as a matter of law, filing the partition suit could not have been the basis for the landowner's tort claims. Green v. Southern Landfill Mgmt., 914 So. 2d 705, 2005 Miss. LEXIS 722 (Miss. 2005).

RESEARCH REFERENCES

ALR.

Grant of part of cotenancy land, taken from less than all cotenants, as subject of protection through partition. 77 A.L.R.2d 1376.

§ 11-21-43. Party evicted to have partition of residue.

If any person who has received a share of land partitioned, shall be evicted therefrom, or from any portion thereof, by a paramount title existing at the time of the partition, and there be a residue of land left not subject to such paramount title, the party so evicted shall be entitled to a new partition of the residue.

HISTORY: Codes, 1857, ch. 36, art. 61; 1871, § 1835; 1880, § 2571; 1892, § 3114; 1906, § 3538; Hemingway's 1917, § 2850; 1930, § 2940; 1942, § 981.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.
59A Am. Jur. 2d, Partition § 9.

§ 11-21-45. New partition; when.

Where the partition was in kind, any joint tenant, tenant in common, or coparcener shall be entitled to a new partition at any time within one year after the first partition, provided, he shall present his sworn petition for that purpose to the chancery court which decreed the partition and shall show thereby (a) that at the time of the partition he was absent from, or a nonresident of the state, and (b) that neither he nor any agent of his received any notice or knowledge whatever of the pendency of the bill for partition, and (c) that the first partition was unfair or unjust or fraudulent as to him, and (d) shall exhibit with said petition the affidavit of at least one credible person to the same effect. Whereupon, if satisfied with the truth of all the grounds aforesaid, the court may proceed to award a new partition; but one who has made improvements on the share first assigned him shall not be evicted from such share; nor shall the improvements be estimated by the second commissioners in fixing its value, but it shall be valued as though the improvements had not been made. If the premises have been sold, and purchased by any of the joint tenants, tenants in common, or coparceners, the nonresident or absent joint tenant, tenant in common or coparcener shall be entitled to set aside such sale at any time within one year thereafter, if it can be shown to have been unfairly made, and fraudulent as to him. In proceedings under this section, all persons interested shall be summoned to appear and contest the application.

HISTORY: Codes, 1857, ch. 36, art. 60; 1871, § 1834; 1880, § 2574; 1892, § 3118; 1906, § 3541; Hemingway's 1917, § 2853; 1930, § 2941; 1942, § 982.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Review of a decree is barred by limitations where not sought within two years after the person seeking review reached majority. Welch v. Parker, 242 Miss. 331, 135 So. 2d 851, 1961 Miss. LEXIS 563 (Miss. 1961).

Where a decree for partition is void as to a non-resident defendant because of defective publication, such defendant may set aside the decree not only as to himself but as to all the parties, and may thereafter defend by showing that the complainant who claimed title to the interest of one of several tenants in common, not a party to the suit by virtue of an execution sale, had never in fact acquired such interest because the judgment in execution under which he purchased was void. Moore v. Summerville, 80 Miss. 323, 31 So. 793, 1902 Miss. LEXIS 256 (Miss. 1902).

In such case the tenant whose interest was claimed by the complainant is a proper party to the proceeding to vacate the decree and sale thereunder. Moore v. Summerville, 80 Miss. 323, 31 So. 793, 1902 Miss. LEXIS 256 (Miss. 1902).

PERSONALTY

Sec.
11-21-71. Partition of personalty.
11-21-73. Partition by county court or justice court.
11-21-75. By whom partition made, if ordered.
11-21-77. Writ to seize property, and proceedings.
11-21-79. Sale; how made when ordered.
11-21-81. Appeal to the circuit court.

§ 11-21-71. Partition of personalty.

Any person entitled to a division of personal property may apply therefor to the chancery court of the proper county, subject to the foregoing provisions of Sections 11-21-1 through 11-21-45 in reference to land, as far as applicable, considering the difference in the kind of property; and a sale or a division may be ordered in such cases, as provided for in case of land which is incapable of equal division, or which it may be to the interest of the parties to sell, and the court shall have power to make all such orders as may be necessary to protect the rights of parties. And any sale or partition ordered in such cases shall be made and reported as in case of the sale or partition of land; and decrees making partition shall vest title according to their terms. In such cases, the court or chancellor may make all orders, and cause to be issued all process necessary to secure the rights of parties; and writs of sequestration may be issued as provided for in any other cases in which they are authorized.

HISTORY: Codes, 1880, §§ 2578, 2579; 1892, § 3120; 1906, § 3543; Hemingway's 1917, § 2855; 1930, § 2942; 1942, § 983.

Cross References — Jurisdiction of county court as to partition of personalty, see § 9-9-1.

Partition of personal property by justice of the peace, see § 11-21-73.

Writs of sequestration, see § 11–29–1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Wife's prior unsuccessful divorce action against her husband did not bar her subsequent action for statutory partition of the parties' real and personal property pursuant to Miss. Code Ann. §§ 11-21-3 and 11-21-71; doctrine of res judicata did not apply as the divorce and the partition action did not share identity of cause of action. Miller v. Miller, 838 So. 2d 295, 2002 Miss. App. LEXIS 434 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. App. LEXIS 167 (Miss. Ct. App. 2003).

Chancery court has jurisdiction of proceeding for partition of personalty. Barry v. Mattocks, 156 Miss. 424, 125 So. 554, 1930 Miss. LEXIS 143 (Miss. 1930).

Partition of personalty, as well as of land, must be between joint tenants, tenants in common, or coparceners. White v. Lefoldt, 78 Miss. 173, 28 So. 818, 1900 Miss. LEXIS 87 (Miss. 1900).

RESEARCH REFERENCES

Am. Jur.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 61-64 (Judicial partition of personal property).

CJS.

68 C.J.S., Partition § 36.

§ 11-21-73. Partition by county court or justice court.

A tenant in common of personal property, not exceeding in value the amount provided in Section 9-11-9, may apply for a partition of it by petition in writing to the county court of the county in which the property or some part of it may be, or, in counties not having a county court, to the justice court of the county in which the property or some part of it may be. Thereupon, all the cotenants shall be summoned and the rights of parties ascertained, and an order made for a division of the property. If the property be incapable of division in kind according to the several interests, or if a sale and division of the proceeds will better promote the interests of parties, the county court or justice court, as the case may be, shall order a sale and a division of its proceeds, and may designate a person to make the sale, and may issue execution specially framed to that end, and make all orders necessary or proper to protect the rights of parties and to effect a sale and division of the proceeds.

HISTORY: Codes, 1880, § 2580; 1892, § 3121; 1906, § 3544; Hemingway's 1917, § 2856; 1930, § 2943; 1942, § 984; Laws, 1981, ch. 471, § 31; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Jurisdiction of county court, see § 9-9-1.

Civil jurisdiction of justices of the peace generally, see § 9-11-9.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

A tenant holding over after expiration of the original term in a lease "with option to rent annually" is not subject to ejectment if notice of an intent and purpose to exercise the option has been established; such provision does not require execution of a new lease covering the extended term. McKeithen v. Bush, 201 Miss. 664, 29 So. 2d 310, 1947 Miss. LEXIS 436 (Miss. 1947).

Under this section [Code 1942, § 984], after condition broken, a trustee in a deed of trust conveying an undivided interest in personalty has such interest as will entitle him to maintain a suit for partition before a justice of the peace of property of less value than one hundred and fifty dollars. Porter v. Stone, 70 Miss. 291, 12 So. 208, 1892 Miss. LEXIS 105 (Miss. 1892).

RESEARCH REFERENCES

CJS.

68 C.J.S., Partition §§ 45, 46.

§ 11-21-75. By whom partition made, if ordered.

If partition be ordered, it shall be made by the county court or the justice of the peace, as the case may be, who shall value the property and divide it equally into as many shares as there are separate owners, and allot the several shares to the different owners after the manner prescribed for the proceeding of commissioners to make partition of real estate, as nearly as may be. A statement of such allotment shall be made by the county judge or the justice on his docket, so as to show what property was allotted to each party. The allotment shall vest the title of the property in the parties to whom it is allotted.

HISTORY: Codes, 1880, § 2581; 1892, § 3122; 1906, § 3545; Hemingway's 1917, § 2857; 1930, § 2944; 1942, § 985.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-21-77. Writ to seize property, and proceedings.

If the petitioner make affidavit at the commencement of his suit, or afterwards, of his right as a tenant in common, and that there is danger of the removal of the property, so as to defeat or endanger his right, the county court or the justice of the peace, as the case may be, shall issue a writ for the seizure of the property; and if the person having it in possession will not give a bond with sufficient sureties, approved by the officer executing the writ, conditioned to have the property forthcoming to abide the final order which shall be made in the case, payable to the petitioner, in a sum sufficient to cover his interest in the property, it shall be delivered to petitioner on his giving a bond, payable to the person from whom it was taken, with sufficient sureties, approved as above provided, in a penalty equal to the value of the interest of such person, conditioned to have the property before the county court or the justice of the peace, as the case may be, to abide the final order in the case; but if neither party give the required bond, the property shall remain in the hands of the officer, unless it be perishable or expensive to keep, in which case it shall be sold, as such property seized under attachment is sold, and the proceeds of the sale shall be disposed of according to the rights of the parties.

HISTORY: Codes, 1880, § 2583; 1892, § 3124; 1906, § 3547; Hemingway's 1917, § 2859; 1930, § 2945; 1942, § 986.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Writ of sequestration and affidavit and bond required therefor, see § 11-29-1 et seq.

Seizure of property as remedy available to holder of lien on the property, see § 85-7-31.

Rule that personal representative shall not remove estate property out of state, see § 91-7-257.

Seizure of property about to be removed from state, see § 93-13-65.

§ 11-21-79. Sale; how made when ordered.

A sale of property ordered by the county court or a justice of the peace, as the case may be, to be made for a division of the proceeds shall be made for cash and on such notice and at such place as sales of like property are made under execution issued by the county court or a justice of the peace, and the money arising from the sale shall be paid to the county court or the justice of the peace, as the case may be, for division among the parties.

HISTORY: Codes, 1880, § 2584; 1892, § 3125; 1906, § 3548; Hemingway's 1917, § 2860; 1930, § 2946; 1942, § 987.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Sale of land when this best serves the interests of the parties to a partition action, see § 11-21-27.

RESEARCH REFERENCES

Am. Jur.

14 Am. Jur. Legal Forms 2d, Partition, §§ 193:51-193:53 (Deed of commissioner or referee following sale).

§ 11-21-81. Appeal to the circuit court.

A person aggrieved may appeal from the judgment of the county court or the justice of the peace, as the case may be, in refusing or ordering a sale or partition, or in making partition, or from any final action of the county court or the justice of the peace, as the case may be, as in any other civil case decided by the county court or a justice of the peace. On appeal, the circuit court may give such judgment as may be right.

HISTORY: Codes, 1880, § 2582; 1892, § 3123; 1906, § 3546; Hemingway's 1917, § 2858; 1930, § 2947; 1942, § 988.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeal from judgment of a justice of the peace generally, see § 11-51-85.

CHAPTER 23.

TRIAL OF RIGHT OF PROPERTY

Sec.	
11-23-1.	Proceedings when third person claims subject of action.
11-23-3.	Third party proceeding applicable to officers.
11-23-5.	Repealed.
11-23-7.	Claim to property levied on; how interposed.
11-23-9.	Execution stayed for value of property claimed, unless.
11-23-11.	Issue to be made up.
11-23-13.	Default in making up issue.
11-23-15.	Burden of proof on plaintiff; trial of issue.
11-23-17.	The judgment.
11-23-19.	Laws applicable in case of death.
11-23-21.	New bond may be required.
11-23-23.	Venue changed in certain cases.
11-23-25.	Proceedings in justice's court.
11-23-27.	Form of a claimant's affidavit.
11-23-29.	Form of a claimant's bond.

§ 11-23-1. Proceedings when third person claims subject of action.

Upon affidavit of a defendant, before pleas filed in any action in a circuit court upon contract or for the recovery of personal property, that a third party, without collusion with him, has a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court may make an order for the safekeeping or payment, or deposit in court, or delivery of the subject matter of the action to such person as it may direct, and an order requiring such third party to be summoned to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being duly summoned, as provided for in the Mississippi Rules of Civil Procedure, shall fail to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if such third party appear, he shall be allowed to make himself defendant in the action at law instead of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof. If the claim of such third party extend to only a part of the subject matter of the action, similar proceedings may be had respecting the part so claimed, and the action shall proceed as to the residue as in other cases.

HISTORY: Codes, 1857, ch. 61, art. 174; 1871, § 656; 1880, § 1578; 1892, § 714; 1906, § 772; Hemingway's 1917, § 555; 1930, § 564; 1942, § 1508; Laws, 1991, ch. 573, § 59, eff from and after July 1, 1991.

Cross References — Method by which a third party may interpose a claim to property levied upon, see §§ 11-23-7 to 11-23-29.

Claim of third person to attached property, see § 11-33-69.

Conflicting claims to goods subject to bill of lading, warehouse receipt or other document of title, see § 75-7-603.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Persons entitled to invoke statute.
3. Making third person a party.
4. Effect of interpleader.
5. Pleading.
6. Judgment or order.
7. Discharge of defendant.

1. In general.

Debtor, who could have invoked the protection of this section [Code 1942, § 1508], but failed to interplead creditor and garnishee, may not thereafter enjoin execution of judgment taken by creditor on indebtedness. Rose v. Brister, 145 Miss. 78, 111 So. 129, 1927 Miss. LEXIS 140 (Miss. 1927).

The interpleader provided for by this section [Code 1942, § 1508] is merely a substitute for an original bill of interpleader in equity and is governed by the same rules. McAlister Bros. & Co. v. Sanders, 107 Miss. 283, 65 So. 249, 1914 Miss. LEXIS 80 (Miss. 1914).

This statute was designed to protect the original defendants, if they desired to disclaim and become mere stakeholders for third persons who, they were informed, had an interest. McCracken v. Lewis, 89 Miss. 229, 42 So. 671 (Miss. 1906).

The statute applies to suits before justices of the peace and to actions for money arising under contracts, express or implied, as well as to suits for personal property. Moore v. Ernst, 54 Miss. 642, 1877 Miss. LEXIS 66 (Miss. 1877).

2. Persons entitled to invoke statute.

One having a right to interplead a claimant of a fund due by him must be a disinterested stakeholder not interested in the further contest of the liabilities or rights of the parties. Penn Mut. Life Ins. Co. v. Williams, 163 Miss. 324, 140 So. 875, 1932 Miss. LEXIS 46 (Miss. 1932).

Where the party summoned into court to maintain or relinquish his claim to a fund paid into court under an affidavit for interpleader makes a claim for a greater amount against the defendant than the original plaintiff made, and it flows out of the same contract or transaction, the defendant is not a disinterested stakeholder, and is not entitled to interplead such claimant under this section [Code 1942, § 1508]. Penn Mut. Life Ins. Co. v. Williams, 163 Miss. 324, 140 So. 875, 1932 Miss. LEXIS 46 (Miss. 1932).

Complainant attaching note in chancery held not entitled to be summoned in law action by note holder against maker. Delta Ins. & Realty Co. v. Fourth Nat'l Bank, 127 Miss. 152, 89 So. 817, 1921 Miss. LEXIS 207 (Miss. 1921).

In action of replevin by a tenant against his landlord's agent who held possession of the property involved for the landlord, the agent was not compelled to resort to this section, although he might do so if he desired, it being incumbent upon the plaintiff to prove the right of immediate possession in himself. Scarborough v. Lucas, 119 Miss. 128, 80 So. 521, 1918 Miss. LEXIS 18 (Miss. 1918).

Where a person claimed an individual joint interest in property replevied, his remedy is not by intervention but by a suit in equity. McCracken v. Lewis, 89 Miss. 229, 42 So. 671 (Miss. 1906).

A defendant, sued upon a contract for the price of timber cut, can interplead a third person who claims ownership of the land and of the trees cut therefrom. Boyle v. Manion, 74 Miss. 572, 21 So. 530, 1896 Miss. LEXIS 180 (Miss. 1896).

On the trial of a motion by plaintiff against a sheriff for failure to pay over money realized under execution, it is proper to allow the officer to withdraw his plea and make an affidavit for substitution of a claimant of the fund as the real party in interest. Kohlman v. First Nat'l Bank, 71 Miss. 843, 15 So. 131, 1894 Miss. LEXIS 37 (Miss. 1894).

3. Making third person a party.

The act of the original defendant does not make a third person a party; an order of court is necessary. Ettringham v. Handy, 60 Miss. 334, 1882 Miss. LEXIS 58 (Miss. 1882).

4. Effect of interpleader.

When insurance company, defendant in suit on life insurance policy by person named as secondary beneficiary in policy, proceeds under this section [Code 1942, § 1508] by interposing its affidavit that third party is claiming proceeds of policy by change of beneficiary and pays money into court, provision of policy that change of beneficiary must be endorsed on face of policy is waived insofar as insurance company is concerned. Gayden v. Kirk, 207 Miss. 861, 43 So. 2d 568, 1949 Miss. LEXIS 397 (Miss. 1949), modified, 208 Miss. 283, 44 So. 2d 410, 1950 Miss. LEXIS 247 (Miss. 1950).

When defendant invokes the provisions of this section [Code 1942, § 1508], he thereby admits liability and that the property sought to be recovered is due either to the plaintiff or the third person claimant, and agrees to pay it over to whichever of these parties the court should direct. McAlister Bros. & Co. v. Sanders, 107 Miss. 283, 65 So. 249, 1914 Miss. LEXIS 80 (Miss. 1914).

5. Pleading.

Where an interpleader brings in irrelevant matter in the statement of his claim such irrelevant matter should be disregarded and is not a ground for demurrer. Caston v. Turner, 95 Miss. 303, 48 So. 721, 1909 Miss. LEXIS 235 (Miss. 1909).

6. Judgment or order.

A person filing an interpleader cannot afterwards claim that the judgment of the court was erroneous in directing payment to one of the defendants interpleading. McAlister Bros. & Co. v. Sanders, 107 Miss. 283, 65 So. 249, 1914 Miss. LEXIS 80 (Miss. 1914).

7. Discharge of defendant.

Where insurance company interpleaded rival claimants and newly joined claimant sought greater recovery than company admitted, discharge of insurance company before issues were made up was error. Williams v. Penn Mut. Life Ins. Co., 160 Miss. 408, 133 So. 649, 1931 Miss. LEXIS 163 (Miss. 1931).

RESEARCH REFERENCES

ALR.

Assertion of fiduciary status of party to litigation as basis for intervention by one claiming interest in fruits thereof as trust beneficiary. 2 A.L.R.2d 227.

Am. Jur.

44B Am. Jur. 2d, Interpleader §§ 1- 7 et seq.

19 Am. Jur. Pl & Pr Forms (Rev), Parties, Form 251.2 (Third-party complaint – Under federal rule or corresponding state rule – By defendant owner of building in which fatal shooting occurred – Against victim's employer).

CJS.

48 C.J.S., Interpleader §§ 12 et seq.

§ 11-23-3. Third party proceeding applicable to officers.

The provisions of the Section 11-23-1 shall be applicable to any action brought in a circuit court against a sheriff or other officer for the recovery of personal property taken by him under executions or attachment, or for the proceeds of property so taken and sold by him; and the defendant in any such action shall have the benefit of said provisions against the party in whose favor the execution or attachment issued by making affidavit that the property, for the recovery of which or its proceeds the action is brought, was taken under process, describing it; and in such case the judgment of the court shall be framed to effect justice between the parties according to their rights.

HISTORY: Codes, 1857, ch. 61, art. 175; 1871, § 657; 1880, § 1579; 1892, § 715; 1906, § 774; Hemingway's 1917, § 557; 1930, § 566; 1942, § 1509.

Cross References — Motions against officers of the court for money collected and not paid over, see § 9-7-89.

Remedy against officer for failure to deliver any fine, forfeiture, or penalty into the county treasury, see § 11-7-219.

Proceedings against attorneys for money collected for clients, but not paid over, see § 11-49-3.

Issuance of executions by clerks of court, see § 13-3-111.

Failure by sheriff to pay over money collected by virtue of execution or attachment, or omission to execute process, see §§ 19-25-45 to 19-25-49.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In a judgment obtained by the widow for the benefit of the children the children are co-plaintiffs with the widow, the sheriff owes them the same duty he does the widow and he has notice of their interests. Kelly v. Howard, 98 Miss. 543, 54 So. 10, 1910 Miss. LEXIS 93 (Miss. 1910); Howard v. Kelly, 111 Miss. 285, 71 So. 391, 1916 Miss. LEXIS 287 (Miss. 1916).

On trial of a motion by a plaintiff against a sheriff for failure to pay over money realized under execution, it is proper under this section [Code 1942, § 1509] to allow the officer to withdraw his plea and make an affidavit for substitution of a claimant of the fund as the real party in interest. Kohlman v. First Nat'l Bank, 71 Miss. 843, 15 So. 131, 1894 Miss. LEXIS 37 (Miss. 1894).

RESEARCH REFERENCES

Am. Jur.

63C Am. Jur. 2d, Public Officers and Employees § 389.

§ 11-23-5. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 177; 1871, § 659; 1880, § 1580; 1892, § 716; 1906, § 774; Hemingway's 1917, § 557; 1930, § 566; 1942, § 1510]

Editor's Notes — Former § 11-23-5 provided that third party proceedings were applicable to offices, and provided for notice when the plaintiff was a nonresident.

§ 11-23-7. Claim to property levied on; how interposed.

When any person not a party to the execution shall claim to be the owner of or to have a lien on any personal property levied upon, such person may make affidavit to his right or title to the property, and may enter into bond, payable to the plaintiff in the execution, with one or more sufficient sureties, in the penalty of double the value of the property claimed, or in double the amount of the execution, if that be less than the value of the property, to be estimated by the officer holding the execution, and indorsed thereon, conditioned for the prosecution of the claim with effect, or, in case of failure therein, for the payment to the plaintiff in the execution of all damages that may be awarded against the claimant, and for the delivery of the property to the proper officer; and upon the making of the affidavit and bond, the officer holding the execution shall receive the same, and shall deliver the property to the claimant, and return the affidavit and bond with the execution. The claim may be interposed without giving bond, and the same proceedings be had thereon except that the property claimed shall not be delivered to the claimant, but shall be sold, as provided in case of property of like kind seized in replevin, or, if not such as should be sold, shall be held by the officer. The bond of the claimant shall stand as security to the parties to the action and judgment may be rendered on it according to the exigency.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 295; 1871, § 858; 1880, § 1774; 1892, § 4425; 1906, § 4990; Hemingway's 1917, § 3264; 1930, § 3424; 1942, § 1021.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21.

Proceedings in replevin, attachment, or as to liens before a justice of the peace, see § 11-9-135.

Proceedings when third person claims subject of action, see § 11-23-1.

Claim of third party to attached property being governed by procedure herein, see § 11-33-69.

Third person's interposition of claim to attached property, see § 11-33-69.

Time limit for issuance of executions on judgments, see § 13-3-111.

How executions shall be issued and returned, see § 13-3-113.

Requirement of bond of indemnity for levy, see § 13-3-157.

Duty of officer to examine judgment-roll prior to payment of money for sale of property, see § 13-3-181.

Claim by third person interested in property upon which a lien is being enforced, see § 85-7-49.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Claimant's issue and right to bring third person and defendant in execution is not triable under Code 1906 §§ 4990-5001, where plaintiff in execution fails to establish that personal property seized is liable to execution. Scruggs v. Electric Paint & Varnish Co., 140 Miss. 615, 105 So. 745 (Miss. 1925).

Where claimant gave bond for attached property and judgment was rendered against him and his sureties, adjudication of claimant as bankrupt does not discharge the liability of claimant and has sureties on the bond. Sanderson v. Buckley, 111 Miss. 748, 72 So. 148, 1916 Miss. LEXIS 382 (Miss. 1916).

Claimant or intervener in attachment is not required to join issue until final judgment. Mahaffey Co. v. Russell & Butler, 100 Miss. 122, 54 So. 807, 1911 Miss. LEXIS 92 (Miss. 1911).

Where the contest is between claimants of property and the seller thereof, Code 1906 §§ 163, 3080, so far as applicable may be used the same as if suit arose in attachment. Quillin v. Paine, 94 Miss. 696, 47 So. 898, 1909 Miss. LEXIS 332 (Miss. 1909).

The Supreme Court has jurisdiction of an appeal by a claimant where the property claimed exceeds fifty dollars in value and has been, by the circuit court on appeal from a justice's court, subjected to an execution for more than that sum, although the amount in controversy in the original suit was less than fifty dollars. Andrews v. Partee, 79 Miss. 80, 29 So. 788, 1901 Miss. LEXIS 9 (Miss. 1901).

The assignee of a landlord's claim for rent is entitled to the remedy by claimant's issue under this section [Code 1942, § 1021]. Thomas v. Shell, 76 Miss. 556, 24 So. 876, 1898 Miss. LEXIS 108 (Miss. 1898).

The remedy provided in this section [Code 1942, § 1021] to enforce a lien on property seized under execution existed under Code of 1880, § 1774. Trice v. Walker, 71 Miss. 968, 15 So. 787, 1894 Miss. LEXIS 10 (Miss. 1894).

The plaintiff must fail in the trial of this issue whether claimant has title or lien or not, unless plaintiff shows the property liable to his execution. Trice v. Walker, 71 Miss. 968, 15 So. 787, 1894 Miss. LEXIS 10 (Miss. 1894).

An affidavit in conformity with this section [Code 1942, § 1021] is sufficient foundation for the claim of a third person replevying property attached for rent and advances. Watkins v. Duvall, 69 Miss. 364, 13 So. 727, 1891 Miss. LEXIS 150 (Miss. 1891).

After a levy upon property claimed by a third party, subsequent levies upon other property to the full amount of the execution, though irregular, will not affect the original levy. Davis v. Netterville, 68 Miss. 429, 10 So. 32, 1890 Miss. LEXIS 83 (Miss. 1890).

The statute does not apply to a special execution in replevin. Andrews v. McLeod, 66 Miss. 348, 6 So. 181, 1889 Miss. LEXIS 104 (Miss. 1889).

The court from which the execution issued alone has jurisdiction of the claimant's issue. Clark v. Clinton, 61 Miss. 337, 1883 Miss. LEXIS 133 (Miss. 1883).

If the claim be dismissed by the court for failure to file the proper affidavit, the dismissal is a determination of the claim, and a failure to deliver the property a breach of the claimant's bond. Higdon v. Vaughn, 58 Miss. 572, 1880 Miss. LEXIS 160 (Miss. 1880).

A claim cannot be maintained for an undivided interest in personalty. Willis v. Loeb, 59 Miss. 169, 1881 Miss. LEXIS 94 (Miss. 1881).

OPINIONS OF THE ATTORNEY GENERAL

Section 11-23-7 prescribes procedures to be followed when a third party makes a claim of ownership in or claims a lien on the property being levied on. In such case the third party may hold up the execution by posting bond. Richardson, September 13, 1995, A.G. Op. #95-0229.

RESEARCH REFERENCES

ALR.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

Am. Jur.

30 Am. Jur. 2d, Executions § 167.

CJS.

33 C.J.S., Executions §§ 516-523.

§ 11-23-9. Execution stayed for value of property claimed, unless.

Further proceedings on the execution shall be stayed for an amount equal to the value of the property claimed, as returned by the officer, until final decision of the claim; and on all subsequent executions issued on the judgment prior to the final decision of the claim, the clerk shall indorse the amount of the estimated value for the government of the officer to whom the same may be directed; but the plaintiff may dismiss the levy, and have execution as if it were never made.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 8 (2); 1857, ch. 61, art. 296; 1871, § 859; 1880, § 1775; 1892, § 4426; 1906, § 4991; Hemingway's 1917, § 3265; 1930, § 3425; 1942, § 1022.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

§ 11-23-11. Issue to be made up.

Upon the return of the execution with the affidavit and bond, if any, the court shall, on motion of the plaintiff in execution, direct an issue to be made up between the parties to try the right of property at the same term, unless good cause be shown for a continuance.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 295; 1871, § 858; 1880, § 1774; 1892, § 4427; 1906, § 4992; Hemingway's 1917, § 3266; 1930, § 3426; 1942, § 1023.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Claimant's issue must be made up at the return term. White v. Roach, 98 Miss. 309, 53 So. 622, 1910 Miss. LEXIS 63 (Miss. 1910).

If an issue be made and a trial had, it will be presumed to have been made under the direction of the court. McAnulty v. Bingaman, 7 Miss. 382, 1842 Miss. LEXIS 54 (Miss. 1842); Phillips v. Cooper, 50 Miss. 722, 1874 Miss. LEXIS 111 (Miss. 1874).

Where several executions are levied, there should be separate issues, trials and judgments. McAnulty v. Bingaman, 7 Miss. 382, 1842 Miss. LEXIS 54 (Miss. 1842).

§ 11-23-13. Default in making up issue.

If by default of the plaintiff in execution an issue for the trial of the right of property be not made up at the term to which the execution is returnable, the court shall discharge the claimant from his bond, and the property shall not thereafter be subject to execution on plaintiff's judgment; but if the claimant fail to join issue when tendered at the first term, the court, at the instance of the plaintiff in execution, shall order a writ of inquiry as to the value of the property, and also to inquire whether or not the claim was made for fraudulent purposes or for purposes of delay.

HISTORY: Codes, 1857, ch. 61, art. 297; 1871, § 860; 1880, § 1776; 1892, § 4428; 1906, § 4993; Hemingway's 1917, § 3267; 1930, § 3427; 1942, § 1024.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Trial court may allow judgment creditor to join issue on third party claim after expiration of term to which garnishment was returnable and at which claim was filed. Wineman v. Clover Farms Dairy, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

Trial court's decision allowing judgment creditor to join issue on third party claim after term to which garnishment is returnable is reviewable only in case of abuse of discretion. Wineman v. Clover Farms Dairy, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." Piqua Sav. Bank v. Copiah Hardware Co., 146 Miss. 581, 111 So. 836, 1927 Miss. LEXIS 225 (Miss. 1927).

Claimant's issue must be made up at return term. White v. Roach, 98 Miss. 309, 53 So. 622, 1910 Miss. LEXIS 63 (Miss. 1910).

It is the duty of both plaintiff in execution and claimant to see that issue is joined as provided by this section [Code 1942, § 1024] and if either fails to do so it cannot be done afterwards, but only such proceedings can be had as the statute provides upon default of plaintiff or claimant, as the case may be. Bedford, French & Goodwin Co. v. W. T. Adams Mach. Co., 93 Miss. 537, 47 So. 429, 1908 Miss. LEXIS 135 (Miss. 1908).

It is the duty of the plaintiff to see that the sheriff returns the execution with the claimant's affidavit and bond, if any, by a day early enough to have an issue made up and tried at the return term of the execution. Sears v. Gunter, 39 Miss. 338, 1860 Miss. LEXIS 53 (Miss. 1860).

§ 11-23-15. Burden of proof on plaintiff; trial of issue.

On the trial of the issue, the burden of proof shall be on the plaintiff in execution, and the issue shall be tried as in ordinary actions at law, and either party shall have the same rights as in other trials. The jury trying the issue, in case it find in favor of the plaintiff in execution, shall assess the value of the property subject to the execution, and shall certify whether the claim was made for fraudulent purposes or for delay. The valuation of the officer taking the bond of the claimant shall be prima facie evidence of the value of the property; and in case the jury fail to find the value of the property, the plaintiff may, at his election, take judgment for the value as returned by the officer, or have a writ of inquiry.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 298; 1871, § 861; 1880, § 1777; 1892, § 4429; 1906, § 4994; Hemingway's 1917, § 3268; 1930, § 3428; 1942, § 1025.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Burden of proof.
2. Evidence necessary.
3. Value of property.
4. Jury to assess value.

1. Burden of proof.

Upon the issue of the trial of the rights of property, the burden of proof was upon the judgment creditor to show that the property seized under execution was the property of the judgment debtor, and the introduction of a decree against the judgment debtor was not sufficient to establish ownership against the claimants. Martin v. McGraw, 190 So. 2d 442, 1966 Miss. LEXIS 1387 (Miss. 1966).

A plaintiff in execution, upon the trial of the claimant's issue, must produce evidence of his right to proceed against the property before claimant can put to defense. Reed v. General Motors Acceptance Corp., 228 Miss. 121, 87 So. 2d 95, 1956 Miss. LEXIS 494 (Miss. 1956).

Where a judgment debtor transferred his automobile to his wife prior to execution thereon, giving rise to question that if the automobile was exempt to the judgment debtor, his wife got it free from the judgment, and if the judgment debtor claimed the exemption given by Code 1942, § 1755, he was not entitled to the exemption provided by Code 1942, § 1766, and vice versa, the trial court erred in rendering judgment for the judgment creditor on the theory that the burden to resolve such question was on the claimant. Reid v. Halpin, 185 Miss. 396, 188 So. 310, 1939 Miss. LEXIS 165 (Miss. 1939).

On trial of claimant's issue burden of proof is on plaintiff in attachment. Third Nat'l Bank v. Reeves Grocery Co., 113 Miss. 35, 73 So. 866, 1916 Miss. LEXIS 6 (Miss. 1916).

It is error to instruct the jury that the judgment sustaining the attachment is prima facie evidence against the claimant, and places the burden of proof on him to show that he is a bona fide purchaser. The burden is always on the plaintiff to show that the goods are liable to his attachment. Ott v. Smith, 68 Miss. 773, 10 So. 70 (Miss. 1891).

If the plaintiff fail to show that the property is liable to his execution, he cannot recover, even though claimant have no title. Ross v. Garey, 8 Miss. 47, 1843 Miss. LEXIS 56 (Miss. 1843); Luther v. Borden, 48 U.S. 1, 12 L. Ed. 581, 1849 U.S. LEXIS 337 (U.S. 1849); Thornhill v. Gilmer, 12 Miss. 153, 1845 Miss. LEXIS 8 (Miss. 1845); Selser v. Ferriday, 21 Miss. 698, 1850 Miss. LEXIS 88 (Miss. 1850).

2. Evidence necessary.

In order to recover plaintiff must offer in evidence the judgment on which the execution was issued, the execution itself and the officer's return thereon. Beeson-Moore Motor Co. v. Catlett, 128 Miss. 865, 91 So. 564, 1922 Miss. LEXIS 170 (Miss. 1922).

On the trial of a claimant's issue for property levied upon under execution the plaintiff cannot recover without offering in evidence the judgment upon which the execution was issued. Blalack v. Stevens, 81 Miss. 711, 33 So. 508, 1902 Miss. LEXIS 201 (Miss. 1902).

On the trial of the issue, the judgment of the plaintiff against the defendant in attachment is a part of the record, and need not be offered in evidence. French v. Sale, 60 Miss. 516, 1882 Miss. LEXIS 92 (Miss. 1882).

On the trial the execution and levy is a necessary part of the plaintiff's evidence. Ross v. Garey, 8 Miss. 47, 1843 Miss. LEXIS 56 (Miss. 1843).

The affidavit is not a part of the record unless made so by a bill of exceptions. Ross v. Garey, 8 Miss. 47, 1843 Miss. LEXIS 56 (Miss. 1843).

3. Value of property.

The value is to be fixed as of the day of trial. Selser v. Ferriday, 21 Miss. 698, 1850 Miss. LEXIS 88 (Miss. 1850).

4. Jury to assess value.

The jury must assess the separate value of each article. Penrice v. Cocks, 2 Miss. 227, 1835 Miss. LEXIS 11 (Miss. 1835); Walker v. Commissioners of Sinking

Fund, 9 Miss. 372, 1843 Miss. LEXIS 170 (Miss. 1843); Pritchard v. Myers, 11 Miss. 42, 1844 Miss. LEXIS 41 (Miss. 1844); Kibble v. Butler, 22 Miss. 207, 1850 Miss. LEXIS 124 (Miss. 1850).

RESEARCH REFERENCES

Am. Jur.

7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 22 (Instruction to jury – Third-party beneficiaries).

§ 11-23-17. The judgment.

If the verdict be in favor of the plaintiff in execution, either on an issue joined or on an inquiry by default, or in case the plaintiff take judgment by default, and elect to take the value as returned by the officer, the court shall render judgment against the claimant and the sureties on his bond, for the restoration of the specific property to the officer, if to be had, and, if not, for the payment of its value not exceeding the amount of the original judgment to the plaintiff, and all costs. If the jury find that the claim was made for fraudulent purposes, or for delay, the judgment shall also award the plaintiff ten per centum damages on the value of the property. If the property be restored to the officer, it shall be sold, under a venditioni exponas to be issued for that purpose, as if the claim had not been made. If bond be not given, and the property or its proceeds be in the hands of the officer, the judgment may be modified accordingly. If the verdict be in favor of the claimant, he shall recover his costs, the levy shall be removed, the claimant shall be discharged from his bond, and the property shall not thereafter be subject to execution on plaintiff's judgment.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 8 (6-9); 1857, ch. 61, art. 299; 1871, § 862; 1880, § 1778; 1892, § 4430; 1906, § 4995; Hemingway's 1917, § 3269; 1930, § 3429; 1942, § 1026.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Measure of recovery.
3. Sureties.
4. Costs.

1. In general.

Court erroneously ordered claimant of property levied upon, who procured property upon executing bond, to surrender truck to plaintiff in execution. Mills v. Churchwell Motor Co., 154 Miss. 631, 122 So. 773, 1929 Miss. LEXIS 175 (Miss. 1929).

A plaintiff in execution who, on a claimant's issue, failed to show his right to subject the property cannot, after judgment in favor of several claimants thereof, object to the misjoinder of issues or to errors in the judgment as between the several claimants. Goyer Cold-Storage Co. v. Wildberger, 71 Miss. 438, 15 So. 235, 1893 Miss. LEXIS 92 (Miss. 1893).

The recovery of a successful plaintiff in a claimant's issue is not invalid because it exceeds the amount of the original judgment with interest and costs. Payment of such amount will be satisfaction and the court of its own motion will protect the claimant as against any excess. Johnston v. Standard Oil Co., 71 Miss. 397, 14 So. 533, 1893 Miss. LEXIS 194 (Miss. 1893).

If a claim be interposed by a trustee in a deed in trust, the plaintiff may prove that the deed in trust was satisfied pending the suit; and in that case he should have judgment for the property, without costs which accrued before the satisfaction. Helm v. Gray, 59 Miss. 54, 1881 Miss. LEXIS 74 (Miss. 1881).

The jury should not find that the claim was sued out for fraudulent purposes or delay unless there be evidence to that effect. McAnulty v. Bingaman, 7 Miss. 382, 1842 Miss. LEXIS 54 (Miss. 1842).

2. Measure of recovery.

Where the wife of the judgment debtor claimed the automobile levied upon by judgment creditors, the measure of the liability of the wife on her claim of fraud, if the judgment creditors should recover a judgment on another trial, would be the value of the automobile at the time the judgment became a lien thereon, less the amount of the unpaid purchase money due and to become due. Reid v. Halpin, 185 Miss. 396, 188 So. 310, 1939 Miss. LEXIS 165 (Miss. 1939).

If the judgment creditors should recover a judgment on another trial, after reversal of judgment in their favor based upon an erroneous theory of burden of proof, the measure of the liability of the claimant on her bond would be the value of the automobile at the time the judgment became a lien thereon, less the amount of the unpaid purchase price due and to become due. Reid v. Halpin, 185 Miss. 396, 188 So. 310, 1939 Miss. LEXIS 165 (Miss. 1939).

Judgment in favor of a successful plaintiff in a claimant's issue should be for the value of the property at the time of trial, not at the time it was received by the claimant. Johnston v. Standard Oil Co., 71 Miss. 397, 14 So. 533, 1893 Miss. LEXIS 194 (Miss. 1893).

3. Sureties.

The sureties on a claimant's bond cannot assign errors in the suit between the plaintiff and his debtor. Atkinson v. Foxworth, 53 Miss. 741, 1876 Miss. LEXIS 143 (Miss. 1876); Higdon v. Vaughn, 58 Miss. 572, 1880 Miss. LEXIS 160 (Miss. 1880).

The sureties subject themselves to the authority of the court. They are parties to the suit, not in the sense of participating in the litigation between the plaintiff and the claimant, but they may show any reason good in law why the bond should not be forfeited. Atkinson v. Foxworth, 53 Miss. 741, 1876 Miss. LEXIS 143 (Miss. 1876).

4. Costs.

If the plaintiff succeeded as to a part of the property he is entitled to recover costs. Clarke v. Parker, 63 Miss. 549, 1886 Miss. LEXIS 136 (Miss. 1886).

§ 11-23-19. Laws applicable in case of death.

All the provisions of law in reference to the death of either party, and the revival of the cause, in personal actions, and the death of any of the obligors, in a bond given in the progress of a cause, and the proceedings thereon before or after judgment, shall apply to proceedings under Sections 11-23-7 through 11-23-29; but in case the claimant shall die before judgment, and there be no representative of his estate, judgment shall be entered against the sureties on his bond for the property, or the value thereof, as assessed by the sheriff, or to be found by the verdict of a jury impaneled to inquire of the same, at the option of the plaintiff, with interest on such value from the date of the claimant's bond.

HISTORY: Codes, 1857, ch. 61, arts. 300, 301, 302; 1871, §§ 863, 864, 865; 1880, §§ 1779, 1780; 1892, § 4431; 1906, § 4996; Hemingway's 1917, § 3270; 1930, § 3430; 1942, § 1027.

Cross References — Proceedings in case of the death of party or surety on bond generally, see §§ 11-1-29 through 11-1-35.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-21. New bond may be required.

If the sureties on the claimant's bond shall become insufficient, the court, on motion of the plaintiff, may require the claimant to give a new bond or to surrender to the officer the property claimed. If new bond be given, the sureties thereon shall be jointly liable with the sureties on the first bond, but if the claimant fail to give a new bond and to surrender the property, judgment shall be rendered against him and the sureties on his bond as by default. If the claimant surrender the property as required, the sureties on the bond given shall thereby be discharged, and the cause shall be proceeded with as if the officer had retained the property in the first instance.

HISTORY: Codes, 1857, ch. 61, art. 303; 1871, § 866; 1880, § 1781; 1892, § 4432; 1906, § 4997; Hemingway's 1917, § 3271; 1930, § 3431; 1942, § 1028.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-23. Venue changed in certain cases.

If the claimant shall not be a resident of the county in which the execution is issued, and the property be levied on in the county of his residence, the venue for the trial of the issue may be changed, on his application, to the circuit court of the county of his residence, and the result shall be certified to the court. The procedure governing a claimant's objection to venue and transfer thereof shall be as provided for in the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1880, § 1782; 1892, § 4433; 1906, § 4998; Hemingway's 1917, § 3272; 1930, § 3432; 1942, § 1029; Laws, 1991, ch. 573, § 60, eff from and after July 1, 1991.

Cross References — Venue in circuit court generally, see § 11-11-3.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-25. Proceedings in justice's court.

If the claim be interposed in a court of a justice of the peace, on filing the affidavit and bond, or the affidavit, if a bond be not given, the justice shall fix a day for the trial, and give notice thereof to the parties.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 11 (5); 1857, ch. 58, art. 31; 1871, § 1338; 1880, § 2227; 1892, § 4434; 1906, § 4999; Hemingway's 1917, § 3273; 1930, § 3433; 1942, § 1030.

Editor's Notes — Pursuant to Miss. Const. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Civil jurisdiction of justices of the peace, generally, see § 9-11-9.

JUDICIAL DECISIONS

1. In general.

The justice of the peace has jurisdiction to try the claim to property levied on under execution from his court, although the value of the property exceed two hundred dollars. Clark v. Clinton, 61 Miss. 337, 1883 Miss. LEXIS 133 (Miss. 1883); Bernheimer v. Martin, 66 Miss. 486, 6 So. 326, 1889 Miss. LEXIS 133 (Miss. 1889).

§ 11-23-27. Form of a claimant's affidavit.

A claimant's affidavit may be in the following form, viz.:

State of Mississippi, ________ County:

"Before me, ________ , a justice of the peace of said county, ________ makes oath that a certain ________ [here describe the property], levied on by virtue of an execution in favor of ________ against ________ , issued by ________ , a justice of the peace of said county, on the ________ day of ________ , A. D. ________ , and now in the hands of ________ , a ________ of ________ county, under said execution, is the property of affiant, and is not the property of ________ .

"Sworn to and subscribed before me, ________ , A. D. ________ ________ , J. P."

HISTORY: Codes, 1880, § 2257; 1892, § 4435; 1906, § 5000; Hemingway's 1917, § 3274; 1930, § 3434; 1942, § 1031.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-23-29. Form of a claimant's bond.

A claimant's bond may be in the following form, viz.:

"We, ________ , principal, and ________ and ________ , sureties, bind ourselves to pay ________ dollars, unless the said ________ shall prosecute with effect his claim to a ________ [here describe the property], levied on by virtue of an execution issued on the ________ day of ________ , A.D. ________ , by ________ court of ________ county, in favor of ________ against ________ , returnable before the ________ court on the ________ day of ________ , A.D. ________ , and valued at ________ dollars: or, in case he fail therein, shall pay to the said ________ all such damages as may be awarded against the said ________ , in case his claim shall not be sustained, and shall deliver the same property to the officer having said execution, if the claim thereto shall be determined against the said ________ .

"Witness our hands, this ________ day of ________ , A. D. ________ .

"________ ,
"________ ,
"________ ,

"I approve the foregoing bond and sureties, this the ______ day of ______ , A.D. ______ .

______ Sheriff."

HISTORY: Codes, 1880, § 2558; 1892, § 4436; 1906, § 5001; Hemingway's 1917, § 3275; 1930, § 3435; 1942, § 1032.

CHAPTER 25.

UNLAWFUL ENTRY AND DETAINER

Article 1. Proceedings Before Justice Court. 11-25-1
Article 3. Proceedings in County Court. 11-25-101

ARTICLE 1.

PROCEEDINGS BEFORE JUSTICE COURT.

Sec.
11-25-1. In what cases a remedy.
11-25-3. Purchaser at sale for taxes.
11-25-5. The complaint.
11-25-7. The warrant.
11-25-9. Repealed.
11-25-11. How warrant directed and executed.
11-25-13. Witnesses subpoenaed.
11-25-15. Depositions to be taken.
11-25-17. The court.
11-25-19. The trial.
11-25-21. Rent recoverable.
11-25-23. Judgment for plaintiff and writ of possession.
11-25-25. Growing crops.
11-25-27. Judgment for defendant for costs.
11-25-29. Repealed.
11-25-31. Judgment not conclusive in another action.

§ 11-25-1. In what cases a remedy.

Any one deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or cestui que trust, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(2); 1857, ch. 42, arts. 2, 3; 1871, § 1582; 1880, § 2645; 1892, § 4461; 1906, § 5039; Hemingway's 1917, § 3311; 1930, § 3456; 1942, § 1033.

Cross References — Provision granting exclusive jurisdiction of unlawful entry and detainer proceedings to county courts, see § 9-9-21.

Jurisdiction of county court generally, see § 9-9-21.

Actions in ejectment, see § 11-19-1.

Parallel provision, see § 11-25-101.
Appeal in cases of unlawful entry and detainer, see § 11-51-83.
Limitation of actions concerning land, see § 15-1-7.
Rule that right of entry is not tolled by death of disseizor, see § 89-1-19.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Foreclosure proceedings.

1. In general.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under this section [Code 1942, § 1033] against the grantors under the deed of trust who remained in, and refused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. Martin v. Leslie, 229 Miss. 656, 91 So. 2d 743, 1957 Miss. LEXIS 310 (Miss. 1957).

2. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 4, 10, 11, 33.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 11 et seq. (complaints in summary proceedings to recover possession of realty).

21 Am. Jur. Proof of Facts 2d 567, Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff.

21 Am. Jur. Proof of Facts 2d 607, Forcible Entry and Detainer: Requisite Force by Defendant.

CJS.

36A C.J.S., Forcible Entry and Detainer §§ 21-32.

Law Reviews.

Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-3. Purchaser at sale for taxes.

The purchaser of land at a sale for taxes, or his vendee, after two years from the date of the sale for taxes, and within three years from such date, may bring the action of unlawful detainer, for the recovery of possession of the land; and a judgment in his favor in the action shall be a bar to any action in any court brought after one year from the date of such judgment, to controvert the tax title to the land, saving the rights of infants and persons of unsound mind to redeem the same.

HISTORY: Codes, 1880, § 538; 1892, § 4461a; 1906, § 5040; Hemingway's 1917, § 3312; 1930, § 3457; 1942, § 1034.

Cross References — A definition of the term "infant", see § 1-3-21.
Proceedings to confirm tax title, see § 11-17-1.

Parallel provision, see § 11-25-103.

Rule that three years' occupation under a tax title bars a suit assailing such title, see § 15-1-15.

Redemption of land sold for taxes, see § 27-45-3 et seq.

Rights of a purchaser of lands at a tax sale, see § 27-45-27.

JUDICIAL DECISIONS

1. In general.

A tenant who, during his tenancy, obtains a tax title to the leased premises from the tax purchaser is precluded from asserting the tax title during the continuance of his tenancy, although the tax sale took place prior to his tenancy, but such estoppel is terminated when he surrenders possession of the premises to his landlord. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746, 1947 Miss. LEXIS 317 (Miss. 1947); James v. Shaffer, 202 Miss. 565, 32 So. 2d 749, 1947 Miss. LEXIS 318 (Miss. 1947).

The plaintiff in an action under this section [Code 1942, § 1034] is only required to show that he has a tax deed to the property and that the action is brought within the prescribed period of time; validity of the tax title is not in issue, unless the tax deed is void on its face. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746, 1947 Miss. LEXIS 317 (Miss. 1947).

Preliminary notice to vacate the premises need not be given tenants of one who was the owner prior to tax sale. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746, 1947 Miss. LEXIS 317 (Miss. 1947).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 4, 10, 11, 33.

CJS.

36A C.J.S., Forcible Entry and Detainer §§ 21-32.

§ 11-25-5. The complaint.

The party turned out of possession, or held out of possession, may exhibit his complaint before the clerk of the justice court of the county within which the lands, or some part thereof, may lie, to the following effect:

"County of ________, to wit:

"AB, of said county, complains that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, whereof he prays the possession. AB, Plaintiff."

The complaint shall be verified by the oath or affirmation of the plaintiff, certified at the foot thereof, after the following manner:

"County of ________, to wit:

"This day the above-named AB made oath (or affirmed) before me, the clerk of the justice court for said county, that the allegations of the above complaint are correct and true.

"Given under my hand, this ________ day of ________, A.D. ________.

________ EF, Clerk of the Justice Court."

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(4); 1857, ch. 42, art. 4; 1871, § 1583; 1880, § 2646; 1892, § 4462; 1906, § 5041; Hemingway's 1917, § 3313; 1930, § 3458; 1942, § 1035; Laws, 1982, ch. 423, § 16.

Cross References — Civil jurisdiction of justices of the peace, generally, see § 9-11-9.

Parallel provision, see § 11-25-105.

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 32, 34, 38.

§ 11-25-7. The warrant.

The clerk of the justice court before whom the complaint is made shall thereupon issue a warrant to the following effect:

"The State of Mississippi

"To the Sheriff of ________ County:

"WHEREAS, AB hath made complaint on oath (or affirmation), before me, the clerk of the justice court for the said county, that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, and hath prayed the possession thereof, this is therefore to command you to summon the said CD to appear at ________ (which shall be at the usual place of holding the justice court of the justice court judge to whom the case is assigned), on the ________ day of ________, before said justice court judge, to answer to the complaint, and have then there this warrant.

"Witness my hand, this ________ day of ________.

____

EF, Clerk of the Justice Court"

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(6); 1857, ch. 42, art. 5; 1871, § 1584; 1880, § 2647; 1892, § 4463; 1906, § 5042; Hemingway's 1917, § 3314; 1930, § 3459; 1942, § 1036; Laws, 1981, ch. 471, § 32; Laws, 1982, ch. 423, § 17.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21.

Parallel provision, see § 11-25-107.

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 8, 33, 35, 37.

§ 11-25-9. Repealed.

Repealed by Laws, 1982, ch. 423, § 26, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to Section 9-11-27(3).

[Codes, 1857, ch. 42, art. 23; 1871, § 1599; 1880, § 2661; 1892, § 4464; 1906, § 5043; Hemingway's 1917, § 3315; 1930, § 3460; 1942, § 1037]

Editor's Notes — Former § 11-25-9 provided for the fining of justice for failure to attend proceeding.

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

§ 11-25-11. How warrant directed and executed.

The warrant shall be directed to the sheriff or any constable of the proper county, as the case may require, and shall be made returnable on a day certain, not less than five (5) days nor more than twenty (20) days after its date, and shall be forthwith executed by the proper officer on the defendant, in the same manner as a summons is required to be served, by delivering a copy, and he shall make due return to the justice court judge to whom the case is assigned, at the time and place therein mentioned, of the manner in which he shall have executed the same.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(6); 1857, ch. 42, art. 6; 1871, § 1585; 1880, § 2648; 1892, § 4465; 1906, § 5044; Hemingway's 1917, § 3316; 1930, § 3461; 1942, § 1038; Laws, 1982, ch. 423, § 18; Laws, 1986, ch. 459, § 22, eff from and after July 1, 1986.

Cross References — Parallel provision, see § 11-25-109.

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 8, 33, 35, 37.

§ 11-25-13. Witnesses subpoenaed.

At any time after the warrant is issued, the clerk of the justice court or the justice court judge to whom the case is assigned may, upon application of either party, issue subpoenas for witnesses, requiring them to attend court before the justice court judge to whom the case is assigned at the time appointed, to give evidence on the trial.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(9); 1857, ch. 42, art. 8; 1871, § 1587; 1880, § 2659; 1892, § 4466; 1906, § 5045; Hemingway's 1917, § 3317; 1930, § 3462; 1942, § 1039; Laws, 1982, ch. 423, § 19.

Cross References — Fees of officers and witnesses in unlawful entry and detainer court, see § 25-7-79.

§ 11-25-15. Depositions to be taken.

Depositions may be taken to be read on the trial, in the same manner and under the same circumstances as in cases before justices of the peace.

HISTORY: Codes, 1892, § 4467; 1906, § 5046; Hemingway's 1917, § 3318; 1930, § 3463; 1942, § 1040.

Editor's Notes — Pursuant to Miss. Const., § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-25-17. The court.

It shall be the duty of the justice court judge to whom the case is assigned, on the days specified, to hold a court for the trial of the complaint. The court shall be considered a court of record. It shall have power to issue alias writs for the defendant, and all proper process to bring before it witnesses or other persons whose attendance may be lawfully required; and may adjourn from day to day and from time to time until the trial shall be ended. The sheriff or constable, as the case may require, shall be attendant upon the court and execute its orders.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(10); 1857, ch. 42, art. 10; 1871, § 1588; 1880, § 2651; 1892, § 4468; 1906, § 5047; Hemingway's 1917, § 3319; 1930, § 3464; 1942, § 1041; Laws, 1981, ch. 471, § 33; Laws, 1982, ch. 423, § 20; Laws, 1986, ch. 459, § 23, eff from and after July 1, 1986.

JUDICIAL DECISIONS

1. In general.

Where a court of unlawful entry and detainer was organized, composed of three justices of the peace, pursuant to a proceeding instituted in that behalf, and they appeared and served without objection, the court acquired jurisdiction of the subject matter, without regard to whether or not the two justices other than the one issuing the process had been summoned in the manner required by law, and the court was vested with authority to render a judgment in the cause. Amis v. Home Owners' Loan Corp., 192 Miss. 309, 5 So. 2d 425, 1941 Miss. LEXIS 39 (Miss. 1941).

The mayor of a municipality, being ex officio a justice of the peace within its territorial limits may participate in the trial of an action of unlawful detainer. Nickles v. Kendricks, 73 Miss. 711, 19 So. 582, 1896 Miss. LEXIS 194 (Miss. 1896); Smith v. Jones, 65 Miss. 276, 3 So. 740, 1887 Miss. LEXIS 53 (Miss. 1887).

If a defendant summoned in unlawful detainer appear on the return day before the justice who issued the warrant, and consent to a postponement of the case to a future day, and on the day fixed again appear before the said justice and another, who rendered judgment for the plaintiff, without objection from defendant, the judgment will be valid. McLemore v. Scales, 68 Miss. 47, 8 So. 844, 1890 Miss. LEXIS 72 (Miss. 1890).

Where the record shows that judgment was rendered several days after the return day of the writ, it will be presumed, if nothing appear to the contrary, that the court met on the return day and adjourned from day to day until the rendition of the judgment. Leavenworth v. Crittenden, 62 Miss. 573, 1885 Miss. LEXIS 111 (Miss. 1885).

The court, when it renders final judgment, is dissolved. It has no power to grant a new trial. Warren v. Trustees of African Baptist Church, 50 Miss. 223, 1874 Miss. LEXIS 48 (Miss. 1874).

The special court is, under the power conferred on the legislature to establish such "inferior courts as may be necessary," a constitutional tribunal. Rabe v. Fyler, 18 Miss. 440, 1848 Miss. LEXIS 109 (Miss. 1848).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 12, 44, 46.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 176.1 (Complaint, petition, or declaration – To recover possession of premises – After statutory notice to quit).

CJS.

36A C.J.S., Forcible Entry and Detainer §§ 96 et seq.

§ 11-25-19. The trial.

If on the day of court and at the place designated, it appears that the defendant has been duly served with the warrant, the justice court judge shall proceed, without further pleadings in writing, to the trial of the complaint.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(10); 1857, ch. 42, art. 11; 1871, § 1589; 1880, § 2652; 1892, § 4469; 1906, § 5048; Hemingway's 1917, § 3320; 1930, § 3465; 1942, § 1042; Laws, 1982, ch. 423, § 21.

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 12, 44, 46.

§ 11-25-21. Rent recoverable.

The plaintiff may, on the trial, claim and establish by evidence, any amount due for arrears of rent of the land of which possession is sought, or a reasonable compensation for the use and occupation thereof; and the justice court judge shall find, upon the evidence, the arrears of rent or reasonable compensation, and may give judgment against the defendant in the action for such arrears of rent or reasonable compensation, and award a writ of fieri facias thereon.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 16(1); 1857, ch. 42, art. 13; 1871, § 1590; 1880, § 2653; 1892, § 4470; 1906, § 5049; Hemingway's 1917, § 3321; 1930, § 3466; 1942, § 1043; Laws, 1982, ch. 423, § 22.

Cross References — Parallel provision, see § 11-25-111.
When goods upon rented lands are liable to execution, see § 89-7-1.

JUDICIAL DECISIONS

1. In general.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under Code of 1942, § 1033, against the grantors under the deed of trust who remained in, and refused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. Martin v. Leslie, 229 Miss. 656, 91 So. 2d 743, 1957 Miss. LEXIS 310 (Miss. 1957).

There can be no double rent in the absence of a notice to quit. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746, 1947 Miss. LEXIS 317 (Miss. 1947).

Judgment may be entered for single rent and also for double rent under Code 1942, § 947. Firestone Tire & Rubber Co. v. Fried, 202 Miss. 370, 31 So. 2d 116, 1947 Miss. LEXIS 287 (Miss. 1947).

Judgment for double rent is limited to that which has accrued prior to rendition of judgment. Stewart v. Miller, 200 Miss. 188, 26 So. 2d 540, 1946 Miss. LEXIS 281 (Miss. 1946).

Under statute (Code 1942, § 947), allowing recovery of double rent against tenant holding over after notice, double rent may be recovered in an action of unlawful entry and detainer inasmuch as this section [Code 1942, § 1043] provides for the recovery in such an action of "any amount for arrears of rent." Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319, 1946 Miss. LEXIS 182 (Miss. 1946).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer § 50.

CJS.

36A C.J.S., Forcible Entry and Detainer § 105.

Law Reviews.

Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-23. Judgment for plaintiff and writ of possession.

If the finding be for the plaintiff, the justice court judge shall render judgment in favor of the plaintiff that he recover possession of the land, with costs, and shall award a writ of habere facias possessionem; and the justice court judge may issue alias writs and enforce the judgment and punish for contempt of process thereon; but a writ of habere facias possessionem or execution shall not issue within five (5) days from the date of the judgment.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 16; 1871, § 1591; 1880, § 2654; 1892, § 4471; 1906, § 5050; Hemingway's 1917, § 3322; 1930, § 3467; 1942, § 1044; Laws, 1982, ch. 423, § 23.

Cross References — Parallel provision, see § 11-25-113.

Form of judgment for person claiming possession of the premises, see § 89-7-41.

Record of the proceedings, and appeals, see § 89-7-47.

RESEARCH REFERENCES

Am. Jur.
35A Am. Jur. 2d, Forcible Entry and Detainer §§ 12, 45, 47 , 51.
12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 61-64, 69-71 (Judgments; writs of restitution or execution).
21 Am. Jur. Proof of Facts 2d 567, Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff.

CJS.
36A C.J.S., Forced Entry and Detainer §§ 91 et seq.

§ 11-25-25. Growing crops.

In case of forfeiture under contract of purchase, the purchaser, and in case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.

HISTORY: Codes, 1892, § 4472; 1906, § 5051; Hemingway's 1917, § 3323; 1930, § 3468; 1942, § 1045.

Cross References — Rule that a growing crop is not subject to judgment lien, see § 11-7-199.
Parallel provision, see § 11-25-115.
Rule that a growing crop shall not be levied upon or attached, see § 13-3-137.
Growing crops on decedent's estate, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.
This section and Section 11-25-115, allowing mortgagor to cultivate and gather crops after foreclosure if crops were planted and growing at time of commencement of foreclosure suit, do not require that mortgagee commence action for unlawful entry and detainer. In re Hilburn, 62 B.R. 597, 1986 Bankr. LEXIS 5765 (Bankr. N.D. Miss. 1986).

RESEARCH REFERENCES

Law Reviews.
Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-27. Judgment for defendant for costs.

If the finding be in favor of the defendant, the justices shall render judgment against the plaintiff that his complaint be dismissed, and the defendant recover of him full costs. The judgment of the justices, either in favor of the plaintiff or the defendant, shall be executed in the same manner as the judgment of any other court of record.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 17; 1871, § 1592; 1880, § 2655; 1892, § 4473; 1906, § 5052; Hemingway's 1917, § 3324; 1930, § 3469; 1942, § 1046.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Parallel provision, see § 11-25-117.

RESEARCH REFERENCES

Am. Jur.

36A Am. Jur. 2d, Forcible Entry and Detainer §§ 46, 51.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 65-66 (Judgment for defendant).

21 Am. Jur. Proof of Facts 2d 607, Forcible Entry and Detainer: Requisite Force by Defendant.

CJS.

36A C.J.S., Forced Entry and Detainer § 106.

§ 11-25-29. Repealed.

Repealed by Laws, 1982, ch. 423, § 26, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to Section 9-11-27(3).

[Codes, 1871, § 1593; 1880, § 2656; 1892, § 4474; 1906, § 5053; Hemingway's 1917, § 3325; 1930, § 3470; 1942, § 1047]

Editor's Notes — Former § 11-25-29 specified that if the court was composed of two justices only, and they disagreed, the decision of the justice before whom the complaint was made would be the judgment of the court.

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

§ 11-25-31. Judgment not conclusive in another action.

A judgment rendered in a suit of unlawful entry or detainer, either for the plaintiff or defendant, shall not bar any action in the circuit court between the same parties, respecting the same land; nor shall any judgment given therein be held conclusive of the facts found in any other action between the same parties.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 22; 1871, § 1598; 1880, § 2660; 1892, § 4475; 1906, § 5054; Hemingway's 1917, § 3326; 1930, § 3471; 1942, § 1048.

Cross References — Parallel provision, see § 11-25-119.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Foreclosure proceedings.

1. In general.

In a proceeding in unlawful entry and detainer to obtain possession of house and lot, title deeds are admissible to prove the right and extent of possession, even though the suit is a possessory action and determination of title is not involved and any purely equitable defenses that defendant may have had could not have been presented in this action, but the judgment shall not bar any action in Circuit Court between the same parties respecting the same land. Tate v. Tate, 217 Miss. 734, 64 So. 2d 908, 1953 Miss. LEXIS 486 (Miss. 1953).

2. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 5, 7, 49.

CJS.

36A C.J.S., Forced Entry and Detainer § 103.

ARTICLE 3.

PROCEEDINGS IN COUNTY COURT.

Sec.
11-25-101. County court; remedy in what cases.
11-25-103. Purchaser of tax lands.
11-25-105. Court — complaint — form.
11-25-107. Warrant.
11-25-109. Execution of warrant.
11-25-111. Rent.
11-25-113. Judgment for plaintiff.
11-25-115. Growing crops.
11-25-117. Judgment for defendant.
11-25-119. Judgment not bar.

§ 11-25-101. County court; remedy in what cases.

Any one deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or cestui que trust, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed.

HISTORY: Codes, 1942, § 1049; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Provision granting exclusive jurisdiction of unlawful entry and detainer proceedings to county courts, see § 9-9-21.

Actions in ejectment, see § 11-19-1.

Parallel provision, see § 11-25-1.

Appeal in cases of unlawful entry and detainer, see § 11-51-83.

Limitation of actions concerning land, see § 15-1-7.

Rule that right of entry is not tolled by death of disseizor, see § 89-1-19.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. By whom maintainable.
3. Against whom maintainable.
4. Conditions precedent to right to bring action.
5. Character of entry or detainer as forcible.
6. Time for bringing action.
7. Defenses.
8. Miscellaneous.
9. Foreclosure proceedings.

1. In general.

Title is not primarily involved in an action of unlawful entry and detainer, the action being possessory only, and all that the plaintiff is required to show in such an action is that he brings himself strictly within the terms of the statute which allows the action to him. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746, 1947 Miss. LEXIS 317 (Miss. 1947).

The action of unlawful entry and detainer is statutory, and the statutes authorizing the remedy are strictly construed, because they are in derogation of the common law. Sistrunk v. Majure, 186 Miss. 814, 192 So. 5, 1939 Miss. LEXIS 279 (Miss. 1939).

Purchaser at foreclosure sale, held not authorized to maintain unlawful entry and detainer against one in possession claiming fee simple title by parol gift followed by adverse possession. Holmes v. Elmer, 182 Miss. 171, 181 So. 325, 1938 Miss. LEXIS 171 (Miss. 1938).

Action for unlawful entry and detainer is possessory and does not adjudicate title as such; in action for unlawful entry and detainer, title deeds are admissible to prove right and extent of possession. McCallum v. Gavin, 149 Miss. 885, 116 So. 94, 1928 Miss. LEXIS 92 (Miss. 1928).

In unlawful entry and detainer cases, it is essential, and the burden of proof is on the complaining party to show that the defendant unlawfully withholds possession of the land in controversy. Murf v. Maupin, 113 Miss. 670, 74 So. 614, 1917 Miss. LEXIS 143 (Miss. 1917); Sistrunk v. Majure, 186 Miss. 814, 192 So. 5, 1939 Miss. LEXIS 279 (Miss. 1939).

Defendant must be in possession before plaintiff can maintain action against him. Walton v. Wall, 110 Miss. 361, 70 So. 549, 1915 Miss. LEXIS 57 (Miss. 1915).

The plaintiff must have been deprived of possession in order to sustain the action. Robinson v. Boggan, 97 Miss. 27, 52 So. 705, 1910 Miss. LEXIS 270 (Miss. 1910).

Possession of plaintiff at the time of alleged entry is necessary to sustain this action. Taylor v. Orlansky, 92 Miss. 761, 46 So. 50, 1908 Miss. LEXIS 260 (Miss. 1908).

The action of unlawful entry and detainer is confined to cases specified in the foregoing, this and the section following [Code 1942, §§ 1049, 1050]. Home Mut. Bldg. & Loan Ass'n v. Leonard, 77 Miss. 39, 25 So. 351, 1899 Miss. LEXIS 47 (Miss. 1899); Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383, 1899 Miss. LEXIS 70 (Miss. 1899).

The action is merely possessory, and does not involve title. Spears v. McKay, 1 Miss. 265, 1827 Miss. LEXIS 10 (Miss. 1827); Loring v. Willis, 5 Miss. 383, 1840 Miss. LEXIS 28 (Miss. 1840); Clark v. Bourgeois, 86 Miss. 1, 38 So. 187, 1905 Miss. LEXIS 6 (Miss. 1905); Paden v. Gibbs, 88 Miss. 274, 40 So. 871, 1906 Miss. LEXIS 145 (Miss. 1906).

2. By whom maintainable.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under Code 1942, § 1033, against the grantors under the deed of trust who remained in, and refused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. Martin v. Leslie, 229 Miss. 656, 91 So. 2d 743, 1957 Miss. LEXIS 310 (Miss. 1957).

A proceeding in unlawful entry and detainer to obtain possession of house and lot is a summary remedy, and may be brought by an owner whose possession is merely constructive. Tate v. Tate, 217 Miss. 734, 64 So. 2d 908, 1953 Miss. LEXIS 486 (Miss. 1953).

Action of unlawful detainer is purely possessory and does not involve title, so that landlord could not maintain such action against lessee and sublessee after expiration of such leases where the landlord had leased all the premises to another who had been and was in possession of part of the premises, notwithstanding provision in the latter lease that exclusive possession would be given to lessee as of the date of the beginning of the lease, since such provision did not constitute an undertaking on the part of the landlord to put the lessee into possession. Ward v. Hudson, 199 Miss. 171, 24 So. 2d 329, 1946 Miss. LEXIS 186 (Miss. 1946).

Grantee of landlord who had months before served notice to vacate on tenant, who went into possession under rental contract requiring him to vacate on fifteen days' notice, unless tenant paid rent in arrears, could maintain unlawful entry and detainer proceeding against tenant, who failed to pay rent, as an "assign" of landlord, although grantee had never been in possession. Williams v. Johnson, 175 Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

Statute authorizing summary remedy against wrongful possession of land gives remedy to one claiming under deed of trust or mortgage, although not immediate vendee or vendee under original grantor in deed of trust. Citizens' Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684, 1934 Miss. LEXIS 181 (Miss. 1934).

A landlord who has leased his land for a term and places his tenant in possession, cannot during the term maintain an action of unlawful entry and detainer under this section [Code 1942, § 1049] against a stranger who entered upon a part of the premises after the term began. Hammel v. Atkinson, 82 Miss. 465, 34 So. 225, 1903 Miss. LEXIS 150 (Miss. 1903).

A railroad exercising ownership over that part of its right of way not occupied by its track in the usual way, such as the nature of the property permitted, has such possession of such part of its right of way as authorizes this action against wrongful entry thereon. Sproule v. Alabama & V. R. Co., 78 Miss. 88, 29 So. 163, 1900 Miss. LEXIS 139 (Miss. 1900).

This action can be brought only in the cases specified in the statute. One whose title is equitable purely, and who has never been in possession and who has no contract with the occupant, express or implied, as to possession, cannot maintain the action. Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383, 1899 Miss. LEXIS 70 (Miss. 1899).

Under this section a purchaser at an execution sale can maintain this action against a tenant of the defendant in execution who withholds possession after his right, the purchaser having become by operation of law the assignee of him who was deprived of possession, or from whom possession was so withheld. This section [Code 1942, § 1049] covers assignees by operation of law as well as by contract. Glenn v. Caldwell, 74 Miss. 49, 20 So. 152, 1896 Miss. LEXIS 105 (Miss. 1896).

A purchaser of land who has been in peaceable possession for six years claiming to a certain fence, the true boundary of the enclosed lot being in dispute, is an assign of such person, within the meaning of this section [Code 1942, § 1047] and may bring this action against the adjoining lot owner who forcibly moved the fence back and took possession of a strip of land, though plaintiff got his deed after such removal. Young v. Barr, 69 Miss. 879, 13 So. 816, 1892 Miss. LEXIS 32 (Miss. 1892).

Owners of the reversion cannot, after the death of the tenant by the courtesy, maintain the action against his lessee. There is no privity between them. Wolfe v. Angevine, 57 Miss. 767, 1880 Miss. LEXIS 55 (Miss. 1880).

If a vendor who has given bond for title part with the purchase-money notes and the legal title to the land, he cannot maintain the action. Clymer v. Powell, 56 Miss. 672, 1879 Miss. LEXIS 188 (Miss. 1879).

One who filed a homestead entry on public lands of the United States cannot maintain the action against persons who had wrongfully settled on the land when "public." McCorkle v. Yarrell, 55 Miss. 576, 1878 Miss. LEXIS 12 (Miss. 1878).

An owner whose possession is merely constructive can maintain the action. Wilson v. Pugh, 32 Miss. 196, 1856 Miss. LEXIS 173 (Miss. 1856).

An action does not lie in favor of a purchaser at sheriff's sale to recover from one who was not liable to the action at the suit of the defendant in execution. Cummings v. Kilpatrick, 23 Miss. 106, 1851 Miss. LEXIS 18 (Miss. 1851).

Where joint tenants are entitled to the action, it may be brought by one alone. Rabe v. Fyler, 18 Miss. 440, 1848 Miss. LEXIS 109 (Miss. 1848).

3. Against whom maintainable.

The action under this section [Code 1942, § 1049] being possessory only, does not lie against one who has entered under a lease valid for a year and holds under a contract enforceable in equity against the plaintiff as a lease for a longer period. Lobdell v. Mason, 71 Miss. 937, 15 So. 44, 1894 Miss. LEXIS 16 (Miss. 1894).

Where one claiming invades the possession of another and seeks by stratagem or device to secure the possession to himself, the statute applies. Parker v. Eason, 68 Miss. 290, 8 So. 844, 1890 Miss. LEXIS 70 (Miss. 1890).

A "scrambling possession" is not sufficient. Benjamin v. Reach, 65 Miss. 347, 3 So. 657, 1887 Miss. LEXIS 67 (Miss. 1887); Blake v. McCroy, 65 Miss. 443, 4 So. 339, 1888 Miss. LEXIS 15 (Miss. 1888).

Where a party goes into possession under an executory agreement to purchase, by refusal to pay the balance due on the purchase-money he from that time becomes a trespasser and the vendor may bring the action against him, having first put defendant in default and asserted the right to end the contract. Loring v. Willis, 5 Miss. 383, 1840 Miss. LEXIS 28 (Miss. 1840); Johnson v. Tuggle, 27 Miss. 836, 1854 Miss. LEXIS 138 (Miss. 1854); Moak v. Bryant, 51 Miss. 560, 1875 Miss. LEXIS 79 (Miss. 1875).

4. Conditions precedent to right to bring action.

The vendor of land must tender deed before he can bring this action. Bowling v. Bowling, 47 So. 802 (Miss. 1908).

If the tenant disclaim the tenancy, or if the defendant dispute plaintiff's right to the possession, a demand is unnecessary before suit. The question of demand is one of costs only. Rabe v. Fyler, 18 Miss. 440, 1848 Miss. LEXIS 109 (Miss. 1848).

5. Character of entry or detainer as forcible.

A mere entry on land against the will of the occupant without other force, intimidation or fraud is sufficient. Clark v. Bourgeois, 86 Miss. 1, 38 So. 187, 1905 Miss. LEXIS 6 (Miss. 1905).

Where a defendant entered into the possession of land, the record title to which was in the plaintiff, under a verbal contract to make payments to the plaintiff in the nature of rent until a certain sum had been paid, when plaintiff was to make defendant a deed, and before completing the payments the defendant repudiated the contract, the action of unlawful detainer will lie in plaintiff's favor. Clark v. Bourgeois, 86 Miss. 1, 38 So. 187, 1905 Miss. LEXIS 6 (Miss. 1905).

An entry upon the land of a person in possession, however quietly made, is forcible within the meaning of this section [Code 1942, § 1049]. Seals v. Williams, 80 Miss. 234, 31 So. 707, 1902 Miss. LEXIS 236 (Miss. 1902).

The owner whose possession is merely constructive can maintain the action against one who enters on it without his consent, even if the entry be peaceable. Wilson v. Pugh, 32 Miss. 196, 1856 Miss. LEXIS 173 (Miss. 1856).

6. Time for bringing action.

Where the record justifies a finding that defendant's possession was permissive until one month before the action was brought, it is not barred by this section [Code 1942, § 1049]. Ellis v. Knight, 239 Miss. 836, 124 So. 2d 694, 1960 Miss. LEXIS 359 (Miss. 1960).

Tenant claiming that unlawful entry and detainer proceeding was barred because not brought within one year after wrongful deprivation or withholding of possession had burden of proving when his possession became adverse. Holmes v. Elmer, 182 Miss. 171, 181 So. 325, 1938 Miss. LEXIS 171 (Miss. 1938).

Mortgagee which had foreclosed deed of trust and received trustee's deed to property in 1933 held not entitled to maintain suit for unlawful entry and detainer in 1936, where there was no contract between mortgagors and mortgagee after foreclosure and mortgagors remained in possession until after institution of suit in 1936. Anthony v. Bank of Wiggins, 178 Miss. 361, 173 So. 454, 1937 Miss. LEXIS 230 (Miss. 1937).

One-year limitation on unlawful entry and detainer did not begin to run when tenant went into possession under contract requiring him to vacate on fifteen days' notice, but only fifteen days after tenant received notice to vacate. Williams v. Johnson, 175 Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

This action must be brought within one year after right accrues. Robinson v. Boggan, 97 Miss. 27, 52 So. 705, 1910 Miss. LEXIS 270 (Miss. 1910).

7. Defenses.

Pendency of attachment against grantor of plaintiff in unlawful entry and detainer proceeding, sued out by defendant and levied on land in controversy, constituted no defense to unlawful entry and detainer proceeding. Williams v. Johnson, 175 Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

Invalidity of trust deed on which plaintiff, in unlawful entry and detainer, based his claim, held available defense, though such action is possessory and title is not involved. Gardner v. Cook, 173 Miss. 244, 158 So. 150, 1934 Miss. LEXIS 389 (Miss. 1934).

In such an action neither the legal title of the property nor any secret equities existing between the parties may be investigated. Clark v. Bourgeois, 86 Miss. 1, 38 So. 187, 1905 Miss. LEXIS 6 (Miss. 1905).

Purely equitable defenses cannot be presented in this action. Home Mut. Bldg. & Loan Ass'n v. Leonard, 77 Miss. 39, 25 So. 351, 1899 Miss. LEXIS 47 (Miss. 1899).

Where a plaintiff claims through a sale under a trust deed defendant can defeat recovery by showing that he gave plaintiff the trust deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax. Williams v. Simpson, 70 Miss. 113, 11 So. 689, 1892 Miss. LEXIS 71 (Miss. 1892).

The defendant in such case need not pay or tender the amount due as he would be required to do on seeking affirmative relief in equity. Williams v. Simpson, 70 Miss. 113, 11 So. 689, 1892 Miss. LEXIS 71 (Miss. 1892).

Defendant cannot defeat the suit by abandoning possession after action begun. Newman v. Mackin, 21 Miss. 383, 1850 Miss. LEXIS 32 (Miss. 1850).

8. Miscellaneous.

Our invoking this statute has the burden of proving when his possession became adverse. Ellis v. Knight, 239 Miss. 836, 124 So. 2d 694, 1960 Miss. LEXIS 359 (Miss. 1960).

In an action of unlawful entry and detainer the record must be so certain that the sheriff could go to the land from the description there to be seen and he could not act on inquiry dehors the record. Price v. Moss, 214 Miss. 253, 58 So. 2d 661, 1952 Miss. LEXIS 465 (Miss. 1952).

In an unlawful entry and detainer action where the judgment described the land as fractional part of the N. E. one-fourth of section 36, township 7, range 4 west, containing 75 acres more or less, the description of property is void for indefiniteness and uncertainty. Price v. Moss, 214 Miss. 253, 58 So. 2d 661, 1952 Miss. LEXIS 465 (Miss. 1952).

The mere fact that the plaintiff in an action for unlawful entry and detainer has an outstanding muniment of title is not proof that the defendant holds possession of the land unlawfully, and where there is no evidence to show that defendant was wrongfully withholding possession of the property in controversy, an action of unlawful entry and detainer cannot be sustained. Sistrunk v. Majure, 186 Miss. 814, 192 So. 5, 1939 Miss. LEXIS 279 (Miss. 1939).

Evidence held not to sustain plaintiff's right to maintain unlawful entry and detainer for possession of filling station and for rent. Coman v. Jourdan, 181 Miss. 674, 180 So. 792, 1938 Miss. LEXIS 108 (Miss. 1938).

Affidavit to complaint by attorney reciting that allegations of complaint were correct and true, held not objectionable for failure to disclose facts were within personal knowledge of affiant. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Where warrant issued on complaint for unlawful entry and detainer complied with statute which merely required that warrant should be made returnable on day certain, not less than five days nor more than twenty days after its date, defendants could not object to being put to trial in present term of court on ground that process had not been issued and served more than five days prior to present term. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Appearance of defendants and their participation in trial of action of unlawful entry and detainer held an admission, in absence of evidence to contrary, that they were withholding land from plaintiff. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

In action of unlawful entry and detainer, deed to plaintiff, in absence of evidence to contrary, constituted sufficient evidence of plaintiff's right to possession of land, since recitals in deed were prima facie correct. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Complaint in action of unlawful entry and detainer reciting that named person, by his attorney, complains that named persons unlawfully withhold from him possession of lands, held not subject to objection that complaint disclosed that possession was withheld from attorney and not client. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

In action of unlawful entry and detainer where deed to plaintiff had been executed before institution of suit, whether deed was recorded before filing of complaint held immaterial as respects right of plaintiff to introduce deed in evidence. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

In action of unlawful entry and detainer, introduction of deed to plaintiff held not objectionable on ground copy of deed not filed with declaration. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Evidence as to value of land in action of unlawful entry and detainer, consisting only of recital in trustee's deed of amount bid by plaintiff at sale, held insufficient to permit Supreme Court to assess damages on appeal. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Title deeds competent evidence to show right of possession. Where possession is denied by defendant burden is on plaintiff to show specific property in possession of defendant. Murf v. Maupin, 113 Miss. 670, 74 So. 614, 1917 Miss. LEXIS 143 (Miss. 1917).

It is competent for the landlord to show in action of unlawful detainer against his tenant refusing to pay rent that the eviction from a part of the premises, of which the tenant complains, was under a mortgage on such part, of which the tenant had knowledge when taking the lease. Cheairs v. Coats, 77 Miss. 846, 28 So. 728, 1900 Miss. LEXIS 56 (Miss. 1900).

9. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 A.L.R.3d 177.

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 4, 10, 11, 33.

CJS.

36A C.J.S., Forcible Entry and Detainer §§ 21-32.

Law Reviews.

Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-103. Purchaser of tax lands.

The purchaser of land at a sale for taxes, or his vendee, after two years from the date of the sale for taxes, and within three years from such date, may bring the action of unlawful detainer, for the recovery or possession of the land; and a judgment in his favor in the action shall be a bar to any action in any court brought after one year from the date of such judgment, to controvert the tax title to the land, saving the rights of infants and persons of unsound mind to redeem the same.

HISTORY: Codes, 1942, § 1050; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Definition of the term "infant", see § 1-3-21.

Proceedings to confirm tax title, see § 11-17-1.

Parallel provision, see § 11-25-3.

Rule that three year's occupation under a tax title bars a suit assailing such title, see § 15-1-15.

Redemption of land sold for taxes, see § 27-45-3 et seq.

Rights of a purchaser of lands at a tax sale, see § 27-45-27.

JUDICIAL DECISIONS

1. In general.

The action of unlawful entry and detainer is statutory, and the statutes authorizing the remedy are strictly construed, because they are in derogation of the common law. Sistrunk v. Majure, 186 Miss. 814, 192 So. 5, 1939 Miss. LEXIS 279 (Miss. 1939).

In an action under this section [Code 1942, § 1050], the action being purely possessory, inquiry as to the condition of the title at the time of sale is immaterial. Foote v. Dismukes, 71 Miss. 110, 13 So. 879, 1893 Miss. LEXIS 141 (Miss. 1893).

It is no defense that the title was not in the defendant, but in his minor children entitled to redeem. Foote v. Dismukes, 71 Miss. 110, 13 So. 879, 1893 Miss. LEXIS 141 (Miss. 1893).

The section [Code 1942, § 1050] applies alike to all sales of land for taxes, and precludes controversy, whatever may be the ground for assailing the title. McLemore v. Scales, 68 Miss. 47, 8 So. 844, 1890 Miss. LEXIS 72 (Miss. 1890); Home Mut. Bldg. & Loan Ass'n v. Leonard, 77 Miss. 39, 25 So. 351, 1899 Miss. LEXIS 47 (Miss. 1899); Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383, 1899 Miss. LEXIS 70 (Miss. 1899).

The state and its vendee can bring the action to recover on a tax-title. Crittenden v. Leavenworth, 62 Miss. 32, 1884 Miss. LEXIS 11 (Miss. 1884).

RESEARCH REFERENCES

Am. Jur.
35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 4, 10, 11, 33.

CJS.
36A C.J.S., Forcible Entry and Detainer §§ 21-32.

§ 11-25-105. Court — complaint — form.

The party turned out of possession, or held out of possession, may exhibit his complaint before the judge or clerk of the county court of the county within which the lands, or some part thereof, may lie, to the following effect:

"County of ________ , to-wit:

"AB, of said county, complains that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, whereof he prays the possession.

"AB, Plaintiff."

The complaint shall be verified by the oath or affirmation of the plaintiff, certified at the foot hereof, after the following manner:

"County of ________ , to-wit:

"This day the above-named AB made oath (or affirmed) before me, ________ of the county court for said county, that the allegations of the above complaint are correct and true.

"Given under my hand, this ________ day of ________ A. D. ________.

"EF, ________ of the County Court."

HISTORY: Codes, 1942, § 1051; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Civil jurisdiction of justices of the peace generally, see § 9-11-9.

Parallel provision, see § 11-25-5.

JUDICIAL DECISIONS

1. In general.

It is not essential to jurisdiction that an affidavit in an unlawful entry and detainer proceeding be made before a justice of the peace of the county in which the lands lie, since the word "may" as used in the statute, is not used in the mandatory sense. Gee v. Rimmer, 188 Miss. 460, 195 So. 342, 1940 Miss. LEXIS 53 (Miss. 1940).

Under statute, on filing of complaint cause is at issue without further pleading, and pleas, replications, rejoinders, surrejoinders, and demurrers are improper. Holmes v. Elmer, 182 Miss. 171, 181 So. 325, 1938 Miss. LEXIS 171 (Miss. 1938).

In action of unlawful entry and detainer, introduction of deed to plaintiff held not objectionable on ground copy of deed not filed with declaration. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Invalidity of trust deed, on which plaintiff in unlawful entry and detainer action based his claim, held available defense, though such action is possessory only and title is not involved. Gardner v. Cook, 173 Miss. 244, 158 So. 150, 1934 Miss. LEXIS 389 (Miss. 1934).

Rent is recoverable as an incident to the suit although affidavit does not demand rent. Stollenwerck v. Eure, 120 Miss. 233, 82 So. 68, 1919 Miss. LEXIS 80 (Miss. 1919).

The land sued for must be described with sufficient accuracy to enable an officer under proper process, should a judgment be rendered for the plaintiff, to remove defendant therefrom without the aid of inquiry dehors the record. Paden v. Gibbs, 88 Miss. 274, 40 So. 871, 1906 Miss. LEXIS 145 (Miss. 1906).

A complaint is not bad for duplicity because it avers an unlawful "turning out" and an "unlawful withholding." If a complaint should be doubled, it could be amended. Brown v. Ashford, 56 Miss. 677, 1879 Miss. LEXIS 190 (Miss. 1879).

If the name of the affiant be omitted from the affidavit, it may be corrected by amendment. Johnson v. Tuggle, 27 Miss. 836, 1854 Miss. LEXIS 138 (Miss. 1854).

A complaint in the language of the statute is sufficient. Torrey v. Cook, 11 Miss. 60, 1844 Miss. LEXIS 43 (Miss. 1844).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 32, 34, 38.

CJS.

36A C.J.S., Forced Entry and Detainer §§ 44-78.

§ 11-25-107. Warrant.

The county judge or the clerk of the county court upon the filing of the complaint shall thereupon issue a warrant to the following effect:

"The State of Mississippi.

"To the Sheriff of ________ County:

"Whereas, AB hath made complaint, on oath (or affirmation), before me, ________ of the county court for the said county, that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, and hath prayed the possession thereof, this is therefore to command you to summon the said CD to appear at ________ (which shall be at the usual place of holding the county court), on the ________ day of ________, before the county court, to answer to the complaint.

"Witness my hand, this ________ day of ________.

"EF, ________ of the County Court."

HISTORY: Codes, 1942, § 1052; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21.

Parallel provision, see § 11-25-7.

JUDICIAL DECISIONS

1. In general.

The warrant is not defective because it does not state that the place at which defendant is required to appear is the "usual place of holding the justice's court in the district." Brown v. Ashford, 56 Miss. 677, 1879 Miss. LEXIS 190 (Miss. 1879).

RESEARCH REFERENCES

Am. Jur.
35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 8, 33, 35, 37.

CJS.
36A C.J.S., Forcible Entry and Detainer §§ 54, 55.

§ 11-25-109. Execution of warrant.

The warrant shall be directed to the sheriff, or any constable of the county, and shall be made returnable to the first term of the county court held after the issuance of the said warrant, unless it shall be issued more than ten days before the said term of court when it may be made returnable before the judge of the county court at the usual place of holding the county court at a day to be named not more than ten days, or less than five days, after the date of issuance of the said warrant; and the cause shall be triable at such term, or before the judge in vacation, (if so returnable), on the day therein, provided the defendant has been served with process at least five days before the return day of writ.

HISTORY: Codes, 1942, § 1053; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-11.

JUDICIAL DECISIONS

1. In general.
Where warrant issued on complaint unlawful entry and detainer complied with statute which merely required that warrant should be made returnable on day certain, not less than five days nor more than twenty days after its date, defendants could not object to being put to trial in present term of court on ground that process had not been issued and served more than five days prior to present term. Huff v. Murray, 171 Miss. 656, 158 So. 475, 1935 Miss. LEXIS 8 (Miss. 1935).

Appearance and motion to quash process constitute sufficient appearance regardless of validity of original summons. Citizens' Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684, 1934 Miss. LEXIS 181 (Miss. 1934).

RESEARCH REFERENCES

Am. Jur.
35A Am. Jur. 2d, Forcible Entry and Detainer §§ 3, 8, 33, 35, 37.

CJS.
36A C.J.S., Forcible Entry and Detainer §§ 54, 55.

§ 11-25-111. Rent.

The plaintiff may, on the trial, claim and establish by evidence, any amount due for arrears of rent on the land of which possession is sought, or a reasonable compensation for the use and occupation thereof; and the judge of the county court, shall find upon the evidence the arrears of rent or reasonable compensation and the judge of the county court may give judgment against the defendant in the action for such arrears of rent or reasonable compensation and may award a writ of fieri facias thereon. All such cases shall be tried by the judge without the intervention of the jury.

HISTORY: Codes, 1942, § 1054; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-21.
When goods upon rented lands are liable to execution, see § 89-7-1.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1054], providing that judge shall find upon evidence the arrears of rent or reasonable compensation, and Code 1942, § 947, allowing double rent against a tenant holding over after notice, are applicable to suits in unlawful entry and detainer. Burr v. Johnson, 204 Miss. 479, 37 So. 2d 747, 1948 Miss. LEXIS 382 (Miss. 1948).

In unlawful entry and detainer action against tenant holding over, imposition of damages at double rent cannot be awarded on testimony which is too vague to establish a rental basis, especially in view of penal nature of such award. Burr v. Johnson, 204 Miss. 479, 37 So. 2d 747, 1948 Miss. LEXIS 382 (Miss. 1948).

Judgment for double rent is limited to that which has accrued prior to rendition of judgment. Stewart v. Miller, 200 Miss. 188, 26 So. 2d 540, 1946 Miss. LEXIS 281 (Miss. 1946).

Under statute (Code 1942, § 947), allowing recovery of double rent against tenant holding over after notice, double rent may be recovered in an action of unlawful entry and detainer inasmuch as this section [Code 1942, § 1054] provides for the recovery in such an action of "any amount for arrears of rent." Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319, 1946 Miss. LEXIS 182 (Miss. 1946).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer § 50.

CJS.

36A C.J.S., Forcible Entry and Detainer § 89.

Law Reviews.

Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-113. Judgment for plaintiff.

If the finding be for the plaintiff, the judge of the county court shall render judgment in favor of the plaintiff, that he recover possession of the land, with costs, and shall award a writ of habere facias possessionem, and said judge may issue alias writs and enforce the judgment and may punish for contempt of process thereon; provided, however, that a writ of habere facias possessionem or execution shall not issue within five days from the date of judgment.

HISTORY: Codes, 1942, § 1055; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-23.
Form of judgment for person claiming possession of the premises, see § 89-7-41.
Record of the proceedings, and appeals, see § 89-7-47.

JUDICIAL DECISIONS

1. In general.

The judgment must describe the property. Murf v. Maupin, 113 Miss. 670, 74 So. 614, 1917 Miss. LEXIS 143 (Miss. 1917).

Where plaintiff claims compensation for use and occupation a mere surrender of possession by defendant will not authorize dismissal of appeal. Cahn v. Wright, 108 Miss. 420, 66 So. 782, 1914 Miss. LEXIS 209 (Miss. 1914).

A purchaser from the state, who brings the action on a tax title, can recover reasonable compensation for the use and occupation of the premises. Leavenworth v. Crittenden, 62 Miss. 573, 1885 Miss. LEXIS 111 (Miss. 1885).

The plaintiff, when too much rent has been awarded him, may remit the excess and thus prevent a new trial. Newman v. Mackin, 21 Miss. 383, 1850 Miss. LEXIS 32 (Miss. 1850).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 12, 45, 47 , 51.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 61-64, 69-71 (Judgments; writs of restitution or execution).

CJS.

36A C.J.S., Forced Entry and Detainer §§ 91 et seq.

§ 11-25-115. Growing crops.

In case of forfeiture under contract of purchase, the purchaser, and in case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.

HISTORY: Codes, 1942, § 1056; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Rule that a growing crop is not subject to judgment lien, see § 11-7-199.

Parallel provision, see § 11-25-25.

Rule that a growing crop shall not be levied upon or attached, see § 13-3-137.

Growing crops on a decedent's estate, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.

This section and Section 11-25-15, allowing mortgagor to cultivate and gather crops after foreclosure if crops were planted and growing at time of commencement of foreclosure suit, do not require that mortgagee commence action for unlawful entry and detainer. In re Hilburn, 62 B.R. 597, 1986 Bankr. LEXIS 5765 (Bankr. N.D. Miss. 1986).

Crops matured and ready to be gathered are personal property belonging to the tenant who has the right, after eviction or after expiration of his lease, to a reasonable time in which to gather the matured crops. Garner v. Stuart Co., 222 Miss. 290, 75 So. 2d 747, 1954 Miss. LEXIS 645 (Miss. 1954).

Pecan nuts matured at time injunction restraining tenant's gathering of crops was sued out by mortgagees under trust deed being foreclosed, held personal property belonging to tenant. Wood v. Pace, 164 Miss. 187, 143 So. 471, 1932 Miss. LEXIS 211 (Miss. 1932).

Purchaser at mortgage sale of land planted by mortgagor's lessee is not entitled to rent reserved, but only subsequent reasonable rental. Joiner v. Leflore Grocer Co., 145 Miss. 31, 110 So. 857, 1926 Miss. LEXIS 40 (Miss. 1926).

The statute is remedial, and should be so construed as to give full effect to its purpose. Parks v. Kline, 118 Miss. 119, 79 So. 81, 1918 Miss. LEXIS 61 (Miss. 1918).

Under foreclosure reasonable rental allowed purchaser. Parks v. Kline, 118 Miss. 119, 79 So. 81, 1918 Miss. LEXIS 61 (Miss. 1918).

Under this proceeding, court at law may determine reasonable compensation for use of land. Parks v. Kline, 118 Miss. 119, 79 So. 81, 1918 Miss. LEXIS 61 (Miss. 1918).

The lawful tenancy of land vests title to crops grown thereon in the tenant subject to the statutory lien of the landlord. Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77, 1910 Miss. LEXIS 102 (Miss. 1910).

After termination of tenancy the tenant has reasonable time to remove crop. Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77, 1910 Miss. LEXIS 102 (Miss. 1910).

RESEARCH REFERENCES

ALR.

Effectiveness of reservation of vendor's crop rights in land contract in absence of such reservation in deed later executed. 8 A.L.R.2d 565.

Law Reviews.

Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-117. Judgment for defendant.

If the finding be in favor of the defendant, the court shall render judgment against the plaintiff that his complaint be dismissed, and that the defendant recover of him full costs.

HISTORY: Codes, 1942, § 1057; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-27.

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer § 48.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 65-66 (Judgment for defendant).

CJS.

36A C.J.S., Forced Entry and Detainer § 106.

§ 11-25-119. Judgment not bar.

A judgment rendered in a suit of unlawful entry or detainer, either for the plaintiff or defendant, shall not bar any action in the circuit court between the same parties, respecting the same land; nor shall any judgment given therein be held conclusive of the facts found in any other action between the same parties.

HISTORY: Codes, 1942, § 1058; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-119.

JUDICIAL DECISIONS

1. In general.

The judgment in an action of unlawful entry and detainer brought by the purchaser of land at a sale under foreclosure of a deed of trust against one claiming title thereto under a parol gift and adverse possession that the former was not entitled to possession of the land was not res judicata to bar a subsequent action by such purchaser to confirm title in the land bought by her under such foreclosure sale. Elmer v. Holmes, 189 Miss. 785, 199 So. 84, 1940 Miss. LEXIS 169 (Miss. 1940).

In unlawful entry and detainer action against execution debtor, creditor's title under constable's deed cannot be conclusively adjudicated. Vansant v. Dodds, 164 Miss. 787, 144 So. 688, 1932 Miss. LEXIS 254 (Miss. 1932).

The judgment in unlawful detainer referred to in this section [Code 1942, § 1058] is no bar to an action of trespass, where the plaintiff in the action of trespass had been wrongfully evicted. As making clear the meaning of this section, see Hutchinson's Code ch 56 p 816; Code 1857 ch 42 art 22; Code 1871 § 1598. Richardson v. Callihan, 73 Miss. 4, 19 So. 95, 1895 Miss. LEXIS 127 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.

35A Am. Jur. 2d, Forcible Entry and Detainer §§ 5, 7, 49.

CJS.

36A C.J.S., Forced Entry and Detainer § 103.

Index

A

ABATEMENT, REVIVAL AND SURVIVAL.
Ejectment.
  Action not abated by death, §11-19-57.

ACCIDENTS.
Railroads.
  Assumption of risk.
    Applicability of rule, §11-7-19.

ACTIONS.
Adult protective services.
  Person who steals, embezzles, extorts or converts property of vulnerable adult.
    Award of damages in civil action, §11-7-165.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.
  General provisions, §§11-15-1 to 11-15-37.
Assignment of cases for trial.
  Responsive pleading required, §11-1-56.
Bench trials.
  Agreement of parties, time for holding, priority item in court, §11-1-18.
Bonds, surety.
  Death of parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
  Death of surety.
    Proceedings on, §11-1-29.
  Irregularities.
    Certain bonds not affected by, §11-1-25.
  Judgment for payment of money, §11-7-173.
  New security.
    Court or judge may require, §11-1-23.
  Payment where payor not identified, §11-1-27.
  State of Mississippi.
    When bonds payable to state, §11-1-27.
Choses in action.
  Assignee of chose in action.
    Right to sue, §11-7-3.
  Sale as other property.
    Not to be commented on, §11-7-7.

ACTIONS —Cont'd
Choses in action —Cont'd
  Setoff or other defense not prejudiced, §11-7-5.
Circuit courts.
  General provisions, §§11-7-1 to 11-7-221.
Copies of books, papers or documents.
  Furnishing, §11-1-51.
Corporations.
  Venue, §11-11-3.
Criminal negligence, §11-7-13.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Executors and administrators.
  Venue of actions against executors and administrators, §11-11-9.
Filing of all papers relating to cause together, §11-1-5.
Forcible entry and detainer, §§11-25-1 to 11-25-119.
Harrison county.
  Commencement of civil actions in each of two judicial districts, §11-1-53.
  Transfer of cases between judicial districts, §11-1-53.
Independent contractors.
  Death of contractor or contractor's employees.
    Immunity of premises owners, §11-1-66.
Initials.
  Defendants may be sued by initials in certain cases, §11-7-41.
Injunctions.
  General provisions, §§11-13-1 to 11-13-41.
Interpleader, §§11-23-1 to 11-23-29.
Justice courts.
  Commencement of suits in civil cases, §11-9-105.
  General provisions, §§11-9-101 to 11-9-147.
Medical licensure, state board of.
  Venue of actions against board, §11-11-15.
Oaths.
  Agent or attorney.
    Oath sufficient in all cases, §11-1-3.

ACTIONS —Cont'd
Partition.
  Personalty, §§11-21-71 to 11-21-81.
  Realty, §§11-21-1 to 11-21-45.
Partnerships.
  Averments partner contract in partnership name, §11-7-43.
Premises owners.
  Death of independent contractor or contractor's employees.
    Immunity, §11-1-66.
Quieting title.
  General provisions, §§11-17-1 to 11-17-37.
Seduction.
  Female child, §11-7-11.
  Unmarried woman, §11-7-9.
Suits to confirm title or interest.
  General provisions, §§11-17-1 to 11-17-37.
Survival of actions.
  Ejectment.
    Action not abated by death, §11-19-57.
Third party claims.
  Interpleader, §§11-23-1 to 11-23-29.
Trees and timber.
  Cutting and boxing trees.
    Venue, §11-11-3.
  Firing wood, §11-11-3.
Trial of right of property, §§11-23-1 to 11-23-29.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.
Vacation.
  Proceedings in vacation, §11-1-16.
Venue.
  General provisions, §§11-11-1 to 11-11-59.

ADDITUR.
Authority to impose, §11-1-55.

ADOPTION.
Wrongful death.
  Status of adoptive child, §11-7-13.

ADULTERATED AND MISBRANDED FOOD.
Wrongful death.
  Breach of warranty of purity or fitness, §11-7-13.

ADVERSE CLAIMS AGAINST TITLE.
Suits to confirm title or interests.
  General provisions, §§11-17-1 to 11-17-37.

ADVERSE POSSESSION.
Quieting title, §§11-17-1 to 11-17-37.

ADVERTISING.
Attorneys at law.
  Not admitted to practice in state, §11-1-8.

ADVISEMENT.
Judges may take cases under advisement, §11-7-131.

AFFIDAVITS.
Injunctions.
  Motion to dismiss injunction, §11-13-31.
Interpleader.
  Form of claimant's affidavit, §11-23-27.
  How claim to property levied on interposed, §11-23-7.

AGENTS.
Oath of agent sufficient where oath of party required, §11-1-3.

ALTERNATIVE DISPUTE RESOLUTION.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.
  General provisions, §§11-15-1 to 11-15-37.

ANSWERS.
Assignment of cases for trial.
  Responsive pleading required, §11-1-56.
Chancery courts.
  Nonresidents.
    Before whom answers of nonresidents may be sworn, §11-5-31.
  Not required in certain cases, §11-5-49.
    Filing of answer or demurrer where answer not required, §11-5-51.

APARTMENTS.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Eviction.
  Forcible entry and detainer, §§11-25-1 to 11-25-119.

APPEALS.
Arbitration.
  Construction contracts.
    Court actions from which appeal may be taken, §11-15-141.

APPEALS —Cont'd
Decree not entered within required time in chancery and circuit courts.
  Right of appeal to supreme court, §11-1-17.
Ejectment.
  Crops.
    Proceedings as to crop upon affirmance of judgment in supreme court, §11-19-89.
  Reversioner or remainderman to have appeal, §11-19-101.
Excessive judgments.
  Release of excess by appellee, §11-1-21.
Partition of personalty.
  County court or justice court judgment.
    Appeal to circuit court, §11-21-81.
Quieting title.
  Confirmation of state land patents, §11-17-11.
  Confirmation of title or interest granted by political subdivision, §11-17-25.

APPRAISALS AND APPRAISERS.
Partition of realty.
  Sale of land.
    Court may cause appraisal to be made, §11-21-11.
    Land not capable of division, §11-21-27.

ARBITRATION, §§11-15-1 to 11-15-37.
Appeals.
  Construction contracts.
    Court actions from which appeal may be taken, §11-15-141.
Arbitrators.
  Disqualifications, §11-15-3.
  Majority may make award, §11-15-11.
  Meeting, §11-15-11.
  Notice of hearing to parties, §§11-15-5, 11-15-7.
  Oath, §11-15-9.
  Time and place of hearing.
    Appointment, §11-15-5.
Attorneys at law.
  Construction contracts.
    Representation at proceedings, §11-15-115.
Award.
  Confirmation by court, §11-15-21.
    Construction contracts, §11-15-125.
  Correction, §§11-15-25, 11-15-29.
    Construction contracts, §§11-15-123, 11-15-135.

ARBITRATION —Cont'd
Award —Cont'd
  Correction —Cont'd
    Time for motion, §11-15-27.
  Court's powers over awards.
    Provisions not construed to take away, §11-15-37.
  Judgment on.
    Rendition, §11-15-31.
  Majority vote of arbitrators, §11-15-11.
  Modification, §§11-15-25, 11-15-29.
    Construction contracts, §§11-15-123, 11-15-135.
    Time for motion, §11-15-27.
  Pending suits.
    Effect of award, §11-15-35.
  Signing by arbitrators, §11-15-19.
  Vacating award.
    Construction contracts, §§11-15-133, 11-15-135.
  Vacation, §§11-15-23, 11-15-29.
    Time for motion, §11-15-27.
  Writing required, §11-15-19.
Confirmation of award by court, §11-15-21.
Conflicts of interest.
  Disqualification of arbitrators, §11-15-3.
Construction contracts, §§11-15-101 to 11-15-143.
Construction of provisions, §11-15-37.
Contempt.
  Failure to obey subpoena, §11-15-17.
Costs, §11-15-33.
Discovery.
  Construction contracts, §11-15-117.
Judgments.
  Construction contracts, §§11-15-137, 11-15-139.
  Rendition of judgment on award, §11-15-31.
Jurisdiction.
  Construction contracts.
    Circuit courts, §11-15-129.
Mentally ill persons.
  Persons who may not submit to arbitration, §11-15-1.
Minors.
  Persons who may not submit to arbitration, §11-15-1.
Notice.
  Construction contracts.
    Hearing by arbitrators, §11-15-113.
    Notice of intention to arbitrate, §11-15-107.

ARBITRATION —Cont'd
Notice —Cont'd
  Hearing by arbitrators.
    Notice to parties, §§11-15-5, 11-15-7.
Oaths.
  Arbitrators, §11-15-9.
  Witnesses, §11-15-13.
Partition of realty, §11-21-1.
Pending suits may be arbitrated, §11-15-35.
Service of process, §11-15-15.
  Construction contracts.
    Application and notice, §11-15-127.
  Notice to parties of hearing by arbitrators, §11-15-7.
Stays.
  Construction contracts, §11-15-105.
Subpoenas.
  Construction contracts, §11-15-117.
  Legal process for witnesses, §11-15-13.
    Disobedience as contempt, §11-15-17.
Venue.
  Construction contracts, §11-15-131.
Who may submit to arbitration, §11-15-1.
Witnesses.
  Construction contracts.
    Fees, §11-15-117.
    Subpoenas, §11-15-117.
  Legal process for witnesses, §11-15-13.
    Disobedience as contempt, §11-15-17.
  Swearing of witnesses, §11-15-13.

ARCHITECTS.
Contractors.
  Arbitration of contracts, §§11-15-101 to 11-15-143.

ASSIGNMENTS.
Choses in action.
  Assignee may sue, §11-7-3.
    Setoff or other defense not prejudiced, §11-7-5.

ASSUMPTION OF RISK.
Doctrine abolished as to employee when master is negligent, §11-7-19.

ATTACHMENT.
Justice courts, §11-9-135.
Perishable commodities.
  Seizure by legal process, §§11-1-43 to 11-1-49.

ATTORNEY GENERAL.
Quieting title.
  Confirmation of state land patents.
    Duties of attorney general, §11-17-5.

ATTORNEYS AT LAW.
Advertising.
  Not admitted to practice in state, §11-1-8.
Arbitration.
  Construction contracts.
    Representation at proceedings, §11-15-115.
Enrollment of judgments.
  Satisfaction by counsel, §11-7-189.
Legislature.
  Continuance of action or proceeding where counsel is legislator, §11-1-9.
Oaths.
  Oath of attorney sufficient where oath or affirmation of party required, §11-1-3.
Sanctions.
  Assessment for filing frivolous claim, §11-1-54.

ATTORNEYS' FEES.
Partition of realty, §11-21-31.
Products liability cases.
  Indemnification of seller, §11-1-63.

B

BAD CHECKS.
Civil penalties, §11-7-12.

BAILIFFS.
Circuit courts.
  Conversing with jurors, §11-7-149.
Trials.
  Circuit courts.
    Conversing with jurors, §11-7-149.

BALANCE OF MUTUAL DEALING ON DEATH OF ONE PARTY, §11-7-67.

BANANAS.
Seizure by legal process, §§11-1-43 to 11-1-49.

BENCH TRIALS.
Civil actions.
  Agreement of parties, time for holding, priority item in court, §11-1-18.
Unlawful entry and detainer.
  County court, §11-25-111.

BILLS OF COMPLAINT.
Dissolution of injunctions.
  Effect.
    Dismissal of bill of complaint, §11-13-39.

BILLS OF EXCEPTION.
Circuit courts.
  Amendment of bills, §11-7-211.

BOARD OF SUPERVISORS.
Oaths.
  Before whom oaths may be taken, §11-1-1.

BOATS AND OTHER SMALL WATERCRAFT.
Damages.
  Liability of ships and vessels for causing death or injury, §11-7-175.
Wrongful death, §11-7-175.

BONDS, SURETY.
Actions.
  Death of parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
  Death of surety.
    Proceedings on, §11-1-29.
  Irregularities.
    Certain bonds not affected by, §11-1-25.
  New security.
    Court or judge may require, §11-1-23.
  State of Mississippi.
    When bonds payable to state, §11-1-27.
Chancery courts.
  New bond required when security insufficient in certain cases, §11-5-123.
  Receivers.
    Appointment without notice, §11-5-155.
    Bond in lieu of receiver, §11-5-157.
    Bond of receiver, §11-5-159.
  Sale of realty under decrees.
    Bond to prevent confirmation, §11-5-109.
    Person making sale, §11-5-93.
Circuit courts.
  Judgment on bonds for money, §11-7-173.

BONDS, SURETY —Cont'd
Circuit courts —Cont'd
  Remedial orders as to property.
    Party applying for order, §11-7-169.
Death of parties on bonds having force of judgment, §11-1-31.
  Citation in anticipation of judgment, §11-1-33.
    When citation issued and returnable, §11-1-35.
Ejectment.
  Crop growing on land, §11-19-87.
    Exceptions to insufficient bond, §11-19-93.
    Judgment on the bond in proceedings involving crop, §11-19-91.
Injunctions, §§11-13-3 to 11-13-9.
  Collection of taxes, §11-13-13.
  Judgments.
    Certain injunction bonds to operate as judgments, §11-13-33.
Interpleader.
  Claimant, §11-23-7.
  Form of claimant's bond, §11-23-29.
  New bond may be required, §11-23-21.
Partition of personalty.
  County court or justice court.
    Petitioner, §11-21-77.
Payment where payor not identified, §11-1-27.

BREAKING AND ENTERING.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.

BUILDINGS AND CONSTRUCTION.
Contracts.
  Construction contracts, §§11-15-101 to 11-15-143.

BURDEN OF PROOF.
Interpleader.
  Plaintiff, §11-23-15.
Products liability.
  Conditions for liability, §11-1-63.
Punitive damages, §11-1-65.

C

CAP ON DAMAGES.
Medical malpractice.
  Noneconomic damages, §11-1-60.

CAP ON DAMAGES —Cont'd
Punitive damages, §11-1-65.

CHANCERY COURTS.
Answers.
  Nonresidents.
    Before whom answers of nonresidents may be sworn, §11-5-31.
  Not required in certain cases, §11-5-49.
    Filing of answer or demurrer where answer not required, §11-5-51.
Appeals.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk below, §11-3-31.
    Decree not entered within required time in chancery court.
      Right of appeal to, §11-1-17.
Bonds, surety.
  New bond required when security insufficient in certain cases, §11-5-123.
  Person making sale, §11-5-93.
  Receivers.
    Appointment without notice, §11-5-155.
    Bond in lieu of receiver, §11-5-157.
    Bond of receiver, §11-5-159.
  Sale of realty under decrees.
    Bond to prevent confirmation, §11-5-109.
    Person making sale, §11-5-93.
Chancellors.
  Decrees.
    Time for rendition of final decree, §11-1-17.
  Nonresident defendants.
    Before whom answers may be sworn, §11-5-31.
  Vacation.
    Proceedings in vacation, §11-1-16.
Clerks of court.
  Issuance of process, §11-5-83.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk of court below, §11-3-31.
Conveyances.
  Decree to operate as conveyance, §11-5-85.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.

CHANCERY COURTS —Cont'd
Decedents' estates.
  Receiver of estate of decedent, §11-5-163.
Decrees.
  Conveyance.
    Decree to operate as, §11-5-85.
  Execution.
    Sheriff to execute decrees, §11-5-83.
  Judgment of circuit court.
    Decree to operate as, §11-5-79.
  Payment of money.
    Fieri facias or garnishment on decree for, §11-5-81.
Demurrers.
  Filing of demurrer where answer not required, §11-5-51.
Executors and administrators.
  Answer not required in certain cases.
    Matters testamentary and of administration, §11-5-49.
  Fieri facias or garnishment.
    Judgment or decree for payment of money against executor or administrator, §11-5-81.
  Sale of realty under decrees.
    Generally, §§11-5-93 to 11-5-117.
  Venue of suit, §11-5-1.
Fieri facias.
  Decrees for money, §11-5-81.
  Issuance of writ by clerk, §11-5-83.
Fraudulent conveyances.
  Creditors may attack fraudulent conveyances, §11-5-75.
Garnishment.
  Decrees for money, §11-5-81.
Habere facias possessionem.
  Issuance of writ by clerk, §11-5-83.
Judgments.
  Decree to operate as judgment of circuit court, §11-5-79.
  Payment of money.
    Fieri facias or garnishment on judgment for, §11-5-81.
  Reopening of judgment rendered on publication only, §11-5-91.
Judicial sales.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.
Jurisdiction.
  Fraudulent conveyances.
    Creditors attacking, §11-5-75.
  Partition of realty, §11-21-3.
  Want of jurisdiction.
    Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.

CHANCERY COURTS —Cont'd
Jury.
  Change of venue in jury cases, §11-5-5.
  Failure to appear, §11-5-3.
  Selection of jurors, §11-5-3.
  Trial of issue by jury, §11-5-3.
Liens.
  Receivers, liens for payment for services, §11-5-167.
Mental illness or intellectual disability.
  Answer not required, §11-5-49.
Minors.
  Answers not required in certain cases, §11-5-49.
  Receiver of estate of minor, §11-5-163.
  Sale of realty under decrees.
    Applicability of provisions, §11-5-113.
    Rights of infants saved, §11-5-115.
Partition of personalty, §11-21-71.
Partition of realty.
  General provisions, §§11-21-1 to 11-21-45.
Payment of money into court.
  Receiver of money paid, §11-5-165.
Pleadings.
  Answers, §§11-5-31, 11-5-49, 11-5-51.
Publication.
  Reopening of judgment rendered on publication only, §11-5-91.
Quieting title.
  General provisions, §§11-17-1 to 11-17-37.
Receivers, §§11-5-151 to 11-5-167.
  Appointment.
    Estate of decedent, minor, or person of unsound mind, §11-5-163.
    Notice, §§11-5-153, 11-5-155.
    Vacation, §11-5-151.
  Bonds, surety.
    Bond in lieu of receiver, §11-5-157.
    Bond of receiver, §11-5-159.
    Complainant to give bond before receiver appointed without notice, §11-5-155.
  Compensation, §11-5-167.
  Estate of decedents, minors, and persons of unsound mind.
    Appointment for protection of, §11-5-163.
  Liens for payment for services, §11-5-167.
  Money paid into court, §11-5-165.
  Orders of court.
    Subject to, §11-5-161.

CHANCERY COURTS —Cont'd
Receivers —Cont'd
  Removal.
    Vacation, §11-5-151.
  Vacation.
    Application for orders of court in vacation, §11-5-161.
    Appointment or removal in vacation, §11-5-151.
Sale of realty under decrees, §§11-5-93 to 11-5-117.
  Adjournment of sale, §11-5-99.
  Applicability of provisions, §11-5-113.
  Balance due to complainant.
    Decree for balance after sale of property, §11-5-111.
  Bonds, surety.
    Bond to prevent confirmation, §11-5-109.
  Confirmation of sale.
    Bond to prevent confirmation, §11-5-109.
    Vacation, §11-5-107.
  Death of executor or other person authorized.
    Who may sale or convey, §11-5-105.
  Generally, §11-5-93.
  Hour of sale, §11-5-99.
  Lien on land sold on credit, §11-5-97.
  Minors.
    Applicability of provisions, §11-5-113.
    Rights of infants saved, §11-5-115.
  Private sale authorized, §11-5-117.
  Purchase by person making sale prohibited, §11-5-101.
  Report of sale, §§11-5-103, 11-5-107.
  Terms of sale.
    Court may fix, §11-5-95.
  Time and place of sale.
    Court may direct, §11-5-95.
  Vacation.
    Reporting and confirmation of sales in vacation, §11-5-107.
Sheriffs.
  Execution of decrees, §11-5-83.
Transfer of cause to circuit court.
  Certification of transferred causes, §11-1-37.
  Costs in transferred causes, §11-1-41.
  Proceedings in transferred causes, §11-1-39.
Vacation.
  Receivers.
    Application for orders of court in vacation, §11-5-161.

CHANCERY COURTS —Cont'd
Vacation —Cont'd
  Receivers —Cont'd
    Appointment or removal in vacation, §11-5-151.
  Sale of realty under decrees.
    Reporting and confirmation of sales in vacation, §11-5-107.
Venue, §11-5-1.
  Change of venue in jury cases, §11-5-5.
  Partition of realty, §11-21-3.
Writs.
  Clerk to issue certain writs, §11-5-83.
  Fraudulent conveyances.
    Issuance of writ of sequestration or injunction or both, §11-5-75.

CHILDREN AND MINORS.
Arbitration.
  Persons who may not submit to arbitration, §11-15-1.
Chancery courts.
  Answers not required in certain cases, §11-5-49.
  Receiver of estate of minor, §11-5-163.
  Sale of realty under decrees.
    Applicability of provisions, §11-5-113.
    Rights of infants saved, §11-5-115.
Partition of realty.
  Parties to proceedings, §11-21-5.
Seduction.
  Female child under eighteen years of age, §11-7-11.

CHOSES IN ACTION.
Assignee may sue, §11-7-3.
  Setoff or other defense not prejudiced, §11-7-5.
Sale as other property.
  Not to be commented on, §11-7-7.

CIGARETTES AND TOBACCO PRODUCTS.
Wrongful death.
  Breach of warranty of purity or fitness, §11-7-13.

CIRCUIT COURTS.
Appeals.
  Exceptions in trials by court.
    Either party may take exception and have appeal, §11-7-135.
  Partition of personalty.
    Appeal from judgment of county court or justice court, §11-21-81.

CIRCUIT COURTS —Cont'd
Assumption of risk.
  Doctrine abolished as to employee when master is negligent, §11-7-19.
Bad checks.
  Civil penalty recoverable for violation of bad check statute, §11-7-12.
Bills of exception.
  Amendment of bills, §11-7-211.
Bonds, surety.
  Judgment on bonds for money, §11-7-173.
  Remedial orders as to property.
    Party applying for order, §11-7-169.
Choses in action.
  Assignee of chose in action.
    Right to sue, §11-7-3.
  Sale as other property.
    Not to be commented on, §11-7-7.
  Setoff or other defense not prejudiced, §11-7-5.
Civil practice and procedure.
  Applicability of provisions, §11-7-1.
Clerks.
  Execution for fines, penalties and forfeitures, §§11-7-217 to 11-7-221.
  Judgment roll, §11-7-189.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk below, §11-3-31.
Confession of judgment, §§11-7-181 to 11-7-185.
  Release of errors.
    Judgment on confession as, §11-7-187.
Construction contracts.
  Arbitration.
    Jurisdiction, §11-15-129.
Contempt.
  Officers of court conversing with jurors, §11-7-149.
  Remedial orders as to property.
    Enforcement, §11-7-169.
Dockets.
  Confession of judgment.
    Docketing on appearance docket, §11-7-183.
Execution for fines, penalties and forfeitures.
  Generally, §11-7-217.
  Liability of officers for default, §11-7-221.
  Remedy against officer, §11-7-219.

CIRCUIT COURTS —Cont'd
Execution of judgments.
  Foreign judgments, §§11-7-305, 11-7-307.
Initials.
  Defendants may be sued by initials in certain cases, §11-7-41.
Judges.
  Advisement.
    Taking of cases under advisement, §11-7-131.
  Decrees.
    Time for rendition of final decree, §11-1-17.
  Jury instructions.
    Judge not to sum up or comment on testimony, §11-7-155.
  Vacation.
    Proceedings in vacation, §11-1-16.
Judgments.
  Bonds for money.
    Judgment on, §11-7-173.
  Confession of judgment, §§11-7-181 to 11-7-185.
  Death of defendant after judgment, §11-7-29.
  Enrollment of judgments, §11-7-189.
    Lien of enrolled judgment, §§11-7-191 to 11-7-199.
  Foreign judgments.
    Interstate enforcement, §§11-7-301 to 11-7-309.
  Lien of enrolled judgment, §§11-7-191 to 11-7-199.
    Crops.
      Growing crop not subject to judgment lien, §11-7-199.
    Forfeiture of priority of lien, §11-7-193.
    Generally, §11-7-191.
    Requirement of enrollment, §§11-7-195, 11-7-197.
  Release of errors.
    Judgment on confession as, §11-7-187.
  Remedial orders as to property, §11-7-169.
  Revival of judgments.
    Scire facias, §11-7-201.
  Satisfaction of judgment, §11-7-189.
  Ships and vessels.
    Liability for causing death or injury, §11-7-175.
Jurisdiction.
  Construction contracts.
    Arbitration, §11-15-129.

CIRCUIT COURTS —Cont'd
Jurisdiction —Cont'd
  Want of jurisdiction.
    Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.
Jury.
  Deliberations.
    Papers carried out by jury, §11-7-151.
  Instructions, §11-7-155.
  Negligence and contributory negligence.
    Questions for jury, §11-7-17.
  Officers of court not to converse with jurors, §11-7-149.
  Papers carried out by jury, §11-7-151.
  Stating case to jury, §11-7-147.
  Verdicts, §§11-7-157 to 11-7-163.
Negligence.
  Assumption of risk.
    Abolition of doctrine as to employee when master is negligent, §11-7-19.
  Contributory negligence.
    No bar to recovery of damages, §11-7-15.
    Question for jury, §11-7-17.
  Jury questions, §11-7-17.
  Privity.
    Unnecessary to maintain actions brought on account of negligence, §11-7-20.
Opening statements.
  Stating of case to jury, §11-7-147.
Practice and procedure.
  Applicability of provisions to all courts, §11-1-57.
Private way.
  How pleaded, §11-7-107.
Scire facias.
  Revival of judgments, §11-7-201.
Seduction.
  Parent and child.
    Action for seduction of child, §11-7-11.
  Unmarried female may sue for, §11-7-9.
Sheriffs.
  Execution for fines, penalties and forfeitures, §§11-7-217 to 11-7-221.
  Jury.
    Officers not to converse with jurors, §11-7-149.
Transfer of cause to chancery court.
  Certification of transferred causes, §11-1-37.

CIRCUIT COURTS —Cont'd
Transfer of cause to chancery court —Cont'd
  Costs in transferred causes, §11-1-41.
  Proceedings in transferred causes, §11-1-39.
Verdicts.
  Defective verdict.
    Reformed at the bar, §11-7-159.
  Form.
    No special form required, §11-7-157.
  Further jury deliberations if verdict not responsive, §11-7-161.
  Informal verdict.
    Reformed at the bar, §11-7-159.
  Omissions.
    Certain omissions not error, §11-7-163.
Warranties.
  Implied warranties.
    Limitation of remedies or disclaimer of liability prohibited as certain implied warranties, §11-7-18.
  Privity unnecessary to maintain actions brought on account of breach of warranty, §11-7-20.
Wrongful death.
  Actions for injuries producing death, §11-7-13.

CIVIL PROCEDURE.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.
  General provisions, §§11-15-1 to 11-15-37.
Bench trials.
  Agreement of parties, time for holding, priority item in court, §11-1-18.
Chancery court.
  General provisions, §§11-5-1 to 11-5-167.
County courts.
  General provisions, §§11-9-1, 11-9-3.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Foreign judgments.
  Interstate enforcement, §§11-7-301 to 11-7-309.
Injunctions.
  General provisions, §§11-13-1 to 11-13-41.
Interpleader, §§11-23-1 to 11-23-29.
Partition.
  Personalty, §§11-21-71 to 11-21-81.

CIVIL PROCEDURE —Cont'd
Partition —Cont'd
  Realty, §§11-21-1 to 11-21-45.
Patient's records.
  Charges for patient photocopying, §11-1-52.
Quieting title, §§11-17-1 to 11-17-37.
Supreme court.
  General provisions, §§11-3-3 to 11-3-43.
Third party claims.
  Interpleader generally, §§11-23-1 to 11-23-29.
Trial of right of property, §§11-23-1 to 11-23-29.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.
Venue of actions.
  General provisions, §§11-11-1 to 11-11-59.

CLEAN HANDS DOCTRINE.
Injunction.
  Necessity of evidence of complainant's equity, §11-13-1.

CLERKS OF COURT.
Appeals.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk below, §11-3-31.
Oaths.
  Before whom oaths may be taken, §11-1-1.

CLOUDS ON TITLE.
Quieting title, §§11-17-1 to 11-17-37.

COMMENCEMENT OF ACTIONS.
Ejectment.
  Filing of complaint, §11-19-15.
  Venue, §11-11-3.
Quieting title, §11-17-31.

CONFESSION OF JUDGMENT.
Docketing, §11-7-183.
Finality, §11-7-183.
Form.
  Offer of judgment, §11-7-181.
Fraud or usury.
  Void if tainted with, §11-7-185.
How offer made, §11-7-181.
Release of errors, §11-7-187.

CONFLICTS OF INTEREST.
Arbitrators.
  Disqualification, §11-15-3.

CONFLICTS OF INTEREST —Cont'd
Judges.
  Venue when judge interested, §11-11-19.
Sale of realty under decrees.
  Purchase by person making sale prohibited, §11-5-101.
Venue.
  Judge interested, §11-11-19.

CONSTABLES.
Justice courts.
  Service of process.
    Execution by sheriff when process not returned by constable, §11-9-107.
    Return of process, §11-9-113.

CONSTRUCTION CONTRACTORS.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.

CONSTRUCTION CONTRACTS.
Arbitration, §§11-15-101 to 11-15-143.
  Agreements to submit controversies to arbitration, §11-15-103.
  Appeals.
    Court actions from which appeal may be taken, §11-15-141.
  Applicability of provisions, §11-15-101.
  Arbitrators.
    Appointment, §11-15-109.
    Expenses and fees.
      Payment as provided in award, §11-15-121.
    Hearing, §11-15-113.
    Majority to exercise powers, §11-15-111.
  Attorneys at law.
    Representation at proceedings, §11-15-115.
  Award, §11-15-119.
    Confirmation, §11-15-125.
    Correction, §11-15-123.
    Fees and expenses, §11-15-121.
    Modification, §§11-15-123, 11-15-135.
    Time for, §11-15-119.
    Vacating award, §§11-15-133, 11-15-135.
  Circuit courts.
    Jurisdiction, §11-15-129.
  Costs, §11-15-137.
  Discovery, §11-15-117.
  Inapplicability of other arbitration provisions, §11-15-143.
  Initiation of arbitration, §11-15-107.

CONSTRUCTION CONTRACTS —Cont'd
Arbitration —Cont'd
  Judgments.
    Docketing, §11-15-139.
    Enforcement, §11-15-137.
    Entry of judgment on award, §11-15-137.
    Judgment roll, §11-15-139.
  Jurisdiction.
    Circuit courts, §11-15-129.
  Notice.
    Form and service, §11-15-127.
    Hearing by arbitrators, §11-15-113.
    Intention to arbitrate, §11-15-107.
  Order to proceed with arbitration.
    Application for, §11-15-105.
  Other arbitration provisions inapplicable, §11-15-143.
  Refusal of binding arbitration provisions in public contracts, §11-15-103.
  Scope of provisions, §11-15-101.
  Service of process.
    Application and notice, §11-15-127.
  Stay, §11-15-105.
  Subpoenas, §11-15-117.
  Venue, §11-15-131.
  Witnesses.
    Fees, §11-15-117.
    Subpoenas, §11-15-117.

CONTEMPT.
Arbitration.
  Failure to obey subpoena, §11-15-17.
Bailiffs.
  Circuit court trials.
    Conversing with jurors, §11-7-149.
Circuit courts.
  Officers of court conversing with jurors, §11-7-149.
  Remedial orders as to property.
    Enforcement, §11-7-169.

CONTINUANCES.
Counsel is legislator, §11-1-9.
Legislator as counsel, §11-1-9.

CONTRACTORS.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.
Independent contractors.
  Death of contractor or contractor's employee.
    Immunity of premises owner, §11-1-66.

CONTRACTS.
Construction contracts.
  Arbitration, §§11-15-101 to 11-15-143.

CONTRIBUTORY NEGLIGENCE.
Jury.
  Question for jury, §11-7-17.
Personal injuries.
  No bar to recovery of damages, §11-7-15.
Wrongful death, §§11-7-13, 11-7-15.

CONVERSION OF PROPERTY.
Adult protective services.
  Person converting property of vulnerable adult.
    Award of damages in civil action, §11-7-165.

CONVEYANCES.
Chancery courts.
  Decree to operate as conveyance, §11-5-85.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.

COPARCENERS.
Ejectment.
  Trial of action between cotenants, §11-19-85.
Partition of realty generally, §§11-21-1 to 11-21-45.

CORPORATIONS.
Actions against corporations.
  Venue, §11-11-3.

CORRUPTION.
Arbitration.
  Vacation of award.
    Grounds, §11-15-23.

COSTS.
Arbitration, §11-15-33.
Products liability cases.
  Indemnification of seller, §11-1-63.
Sexual assault victim seeking injunctive relief, §11-13-41.
Stalking victim seeking injunctive relief, §11-13-41.
Supreme court of Mississippi.
  Appeals to supreme court.
    Collection of court costs, §11-3-41.
Transferred causes, §11-1-41.

COUNTIES.
Injunctions.
  Bond not required of county, §11-13-9.
Venue.
  Commencement of civil actions generally, §11-11-3.

COUNTY ATTORNEYS.
Quieting title.
  Confirmation of state land patents.
    Duties, §11-17-15.

COUNTY COURTS, §§11-9-1, 11-9-3.
Clerks of court.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk below, §11-3-31.
Forcible entry and detainer, §§11-25-101 to 11-25-119.
Judges.
  Vacation.
    Proceedings in vacation, §11-1-16.
Partition of personalty, §§11-21-71 to 11-21-81.
Unlawful entry and detainer, §§11-25-1 to 11-25-119.
Venue, §11-9-3.
Writs.
  Return of writs.
    Writ returnable to justice court, general or special, or circuit or chancery court may be made returnable to county court, §11-9-1.

COURT REPORTERS.
Oaths.
  Before whom oaths may be taken, §11-1-1.

COURTS.
Supreme court.
  General provisions, §§11-3-3 to 11-3-43.

CRIMES.
Circuit courts.
  Officers of court conversing with jurors, §11-7-149.
Jury.
  Circuit courts.
    Officers conversing with jurors, §11-7-149.

CRIMINAL NEGLIGENCE.
Wrongful death, §11-7-13.

CROPS.
Ejectment.
  Appeals.
    Proceedings as to crop upon affirmance of judgment in supreme court, §11-19-89.

CROPS —Cont'd
Ejectment —Cont'd
  Bond when crop growing on land, §11-19-87.
    Exceptions to insufficient bond, §11-19-93.
    Judgment on bond, §11-19-91.
  Rent to be assessed when crop growing on land, §11-19-87.
Forcible entry and detainer.
  County courts, §11-25-115.
  Justice courts, §11-25-25.
Liens.
  Growing crop not subject to, §11-7-199.

D

DAMAGE CAP.
Medical malpractice.
  Noneconomic damages, §11-1-60.
Punitive damages, §11-1-65.

DAMAGES.
Additur.
  Authority to impose, §11-1-55.
Adult protective services.
  Person stealing, embezzling, extorting or converting property of vulnerable adult.
    Award of damages in civil action, §11-7-165.
Boats and other watercraft.
  Liability of ships and vessels for causing death or injury, §11-7-175.
Cap.
  Medical malpractice.
    Noneconomic damages, §11-1-60.
  Punitive damages, §11-1-65.
Contributory negligence, §11-7-15.
Dissolution of certain injunctions.
  Damages on, §§11-13-35, 11-13-37.
Injunctions.
  Bond when injunction not to stay proceedings at law, §11-13-5.
Loss of enjoyment of life.
  Separate element of pain and suffering, §11-1-69.
Malpractice.
  Medical malpractice, §11-1-59.
    Limitation on noneconomic damages, §11-1-60.
Pain and suffering.
  Loss of enjoyment of life, §11-1-69.
Punitive damages, §11-1-65.
Remittitur.
  Authority to impose, §11-1-55.

DAMAGES —Cont'd
Seduction, action for, §11-7-9.
Supreme court of Mississippi.
  Appeals to supreme court.
    Judgments affirmed in part and reversed in part, §11-3-39.
Wrongful death.
  Circuit courts, §11-7-13.

DEATH.
Bonds in actions.
  Death of parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
  Death of surety.
    Proceedings on, §11-1-29.
Ejectment.
  Action not abated by death, §11-19-57.
Judgments.
  Circuit courts.
    Death of defendant after judgment, §11-7-29.
Parties.
  Parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
Trial of right of property.
  Laws applicable in case of death, §11-23-19.

DECEDENTS' ESTATES.
Actions.
  Venue of actions against executors and administrators, §11-11-9.
Balance of mutual dealings on death of one party, §11-7-67.
Bonds in actions.
  Death of parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
  Death of surety, proceedings on, §11-1-29.
Chancery courts.
  Answer not required in certain cases.
    Matters testamentary and of administration, §11-5-49.
  Fieri facias or garnishment.
    Judgment or decree for payment of money against executor or administrator, §11-5-81.
  Receiver of estate of decedent, §11-5-163.
  Sale of realty under decrees generally, §§11-5-93 to 11-5-117.
  Venue of suit, §11-5-1.
Mutual dealings.
  Balance of mutual dealings on death of one party, §11-7-67.
Sale of real property.
  Who may sale or convey.
    Sale under decree, §11-5-105.

DECEDENTS' ESTATES —Cont'd
Venue.
  Actions against executors and administrators, §11-11-9.

DECREE PRO CONFESSO.
Quieting title.
  Confirmation of state land patents.
    No decree pro confesso to be taken against state, §11-17-7.

DEEDS.
Ejectment.
  Recordation of record as deed, §11-19-105.
Quieting title.
  Recordation of decrees as deeds in certain cases, §11-17-35.

DEFAULT JUDGMENTS.
Quieting title.
  Confirmation of title or interest granted by political subdivision, §11-17-21.

DEFENSES.
Ejectment, §11-19-9.

DEFINED TERMS.
Actual economic damages.
  Medical malpractice, §11-1-60.
Assignee.
  Choses in action, §11-7-3.
Foreign judgment, §11-7-301.
Noneconomic damages.
  Medical malpractice, §11-1-60.
Position of trust.
  Adult protective services, §11-7-165.
Premises-liability action.
  Landowners protection act, §11-1-66.1.
Provider of health care.
  Medical malpractice, §11-1-60.
Tract of land.
  Quieting title, §11-17-33.

DEMURRERS.
Chancery courts.
  Filing of demurrer where answer not required, §11-5-51.

DEPOSITIONS.
Forcible entry and detainer.
  Justice courts, §11-25-15.
Oaths.
  Before whom oaths may be taken, §11-1-1.
Physicians.
  Charges for deposition relating to patient physician treating or has treated, §11-1-52.

DETAINERS.
Forcible entry and detainer, §§11-25-1 to 11-25-119.

DISCOVERY.
Arbitration.
  Construction contracts, §11-15-117.
Ejectment.
  Details of claim or title to premises, §11-19-53.

DISMISSAL OF ACTIONS, §11-11-3.

DISPUTE RESOLUTION.
Arbitration.
  Construction contracts, §§11-15-101 to 11-15-143.
  General provisions, §§11-15-1 to 11-15-37.

DISSOLUTION.
Injunctions.
  Affidavits.
    Evidence at motion on hearing, §11-13-31.
  Collection of taxes, §§11-13-15, 11-13-17.
  Damages on dissolution of certain injunctions, §§11-13-35, 11-13-37.
  Dismissal of bill of complaint, §11-13-39.
  Evidence at hearing on motion, §11-13-31.

DISTRICT ATTORNEYS.
Quieting title.
  Confirmation of state land patents.
    Duties, §11-17-15.

DOCKETS.
Confession of judgment.
  Docketing on appearance docket, §11-7-183.

DRUGS AND CONTROLLED SUBSTANCES.
Wrongful death.
  Breach of warranty of purity or fitness, §11-7-13.

E

EJECTION.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.

EJECTMENT, §§11-19-1 to 11-19-105.
Answer, §11-19-19.
  Description of premises.
    Amendment of pleadings, §11-19-21.

EJECTMENT —Cont'd
Appeals.
  Crops.
    Proceedings as to crop upon affirmance of judgment in supreme court, §11-19-89.
  Reversioner or remainderman to have appeal, §11-19-101.
Bonds, surety.
  Crop growing on land, §11-19-87.
    Exceptions to insufficient bond, §11-19-93.
    Judgment on the bond in proceedings involving crop, §11-19-91.
Cases in which action may be maintained, §11-19-1.
Commencement of action.
  Filing of complaint, §11-19-15.
  Venue, §11-11-3.
Complaint, §11-19-15.
  Description of premises.
    Amendment of pleadings, §11-19-21.
  Form, §11-19-25.
Coparceners.
  Trial of action between cotenants, §11-19-85.
Crops.
  Appeals.
    Proceedings as to crop upon affirmance of judgment in supreme court, §11-19-89.
  Bond when crop growing on land, §11-19-87.
    Exceptions to insufficient bond, §11-19-93.
    Judgment on bond, §11-19-91.
  Rent to be assessed when crop growing on land, §11-19-87.
Death.
  Action not abated by death, §11-19-57.
Deeds.
  Recordation of record as deed, §11-19-105.
Defenses, §11-19-19.
Discovery.
  Details of claim or title to premises, §11-19-53.
Joinder.
  Defendant, §11-19-5.
Joint tenants and tenants in common.
  Trial of action between cotenants, §11-19-85.
Judgments.
  Recordation as deed, §11-19-105.

EJECTMENT —Cont'd
Judgments —Cont'd
  Res judicata, §11-19-103.
Jurisdiction, §11-19-3.
Landlord and tenant.
  Landlord to be notified and admitted to defend, §11-19-9.
Liens.
  Mesne profits and value of improvements, §11-19-97.
Life estates.
  Default of tenant for life not to prejudice, §11-19-13.
Mesne profits, §§11-19-95, 11-19-97.
Notice.
  Landlord to be notified, §11-19-9.
Parties.
  Defendant.
    Landlord to be admitted to defend, §11-19-9.
    Reversioner or remainderman admitted to defend, §11-19-11.
    Who may be made defendant, §11-19-5.
Res judicata.
  Judgment as, §11-19-103.
Sale proceeds.
  Division, §11-19-99.
Sufficiency of documents, §11-19-23.
Surveys and surveyors.
  Either party may have survey made, §11-19-55.
Survival of actions.
  Action not abated by death, §11-19-57.
Title.
  Expiration of title of plaintiff, §11-19-81.
  Right to discover details of claim or title to premises, §11-19-53.
Venue of actions, §11-11-3.

ELECTRONIC TRANSACTIONS.
Bad check penalties.
  Applicability to electronic transfers of funds, §11-7-12.

EMBEZZLEMENT.
Adult protective services.
  Person embezzling property of vulnerable adult.
    Award of damages in civil action, §11-7-165.

EMPLOYMENT RELATIONS.
Assumption of risk.
  Abolishing doctrine as to employee when master is negligent, §11-7-19.

EMPLOYMENT RELATIONS —Cont'd
Wrongful death, §11-7-13.

ENFORCEMENT OF FOREIGN JUDGMENTS.
Interstate enforcement, §§11-7-301 to 11-7-309.

ENGINEERS.
Arbitration of contracts, §§11-15-101 to 11-15-143.

ESCHEAT.
Quieting title.
  Mineral interests.
    Receiver for nonresident or unknown owners, §11-17-34.

ESTATES IN LAND.
Partition of realty.
  Paramount rights not affected, §11-21-41.

EVICTION.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Forcible entry and detainer, §§11-25-1 to 11-25-119.
Partition of realty.
  Party evicted to have partition of residue, §11-21-43.

EVIDENCE.
Injunctions.
  Dissolution of injunction.
    Hearing on motion, §11-13-31.
  Motion to dismiss injunction, §11-13-31.
  Necessity of evidence of complainant's equity and truth of allegations, §11-13-1.
Interpleader.
  Value of property, §11-23-15.
Weight of evidence.
  Circuit courts.
    Judge not to sum up or comment on weight, §11-7-155.
Wrongful death.
  Contributory negligence.
    Evidentiary effect, §11-7-15.

EXCULPATORY CLAUSES.
Contracts.
  Fitness for a particular purpose, implied warranty of, §11-7-18.
  Merchantability, implied warranty of, §11-7-18.

EXECUTION OF JUDGMENTS.
Bond issues.
  Stay sale under execution, §11-13-7.
Circuit courts.
  Foreign judgments, §§11-7-305, 11-7-307.
Foreign judgments.
  Interstate enforcement, §§11-7-305, 11-7-307.
Injunctions.
  Bond issues.
    Stay sale under execution, §11-13-7.
  Restoration of personal property levied on, §11-13-19.
  Stay of sale under execution.
    Bond, surety, §11-13-7.
Interpleader.
  Claim for property levied on.
    Stay of execution for value of property claimed, §11-23-9.
  Claim to property levied on.
    How interposed, §11-23-7.
  Generally, §§11-23-1 to 11-23-29.
  Issue to be made up, §11-23-11.
    Default in making up issue, §11-23-13.
Justice courts, §11-9-127.
  Form of execution, §11-9-133.
  Issuance of execution.
    Time for, §11-9-131.
  Stay, §11-9-139.
    Effect, §11-9-141.

EXPERT WITNESSES.
Action against physician, §11-1-61.
  Certificate of consultation to be filed with complaint, §11-1-58.

EXTORTION.
Adult protective services.
  Person extorting property of vulnerable adult.
    Award of damages in civil action, §11-7-165.

F

FAMILY COURTS.
Clerks of court.
  Supreme court appeals.
    Certification of judgment, enforcement duties of clerk below, §11-3-31.
Judges.
  Vacation.
    Proceedings in vacation, §11-1-16.

FIERI FACIAS.
Chancery courts.
  Decree for money, §11-5-81.
  Issuance of writ by clerk, §11-5-83.

FINES.
Bad checks.
  Civil penalty, §11-7-12.
Bailiffs.
  Contempt.
    Conversing with jurors, §11-7-149.
Circuit courts.
  Execution for fines, penalties and forfeitures, §§11-7-217 to 11-7-221.
  Officer of court conversing with jurors, §11-7-149.
Jury.
  Circuit courts.
    Officers conversing with jurors, §11-7-149.

FIREARMS AND OTHER WEAPONS.
Products liability.
  Firearms.
    Authority to sue reserved to state, §11-1-67.

FITNESS FOR A PARTICULAR PURPOSE.
Disclaimer of liability, §11-7-18.

FOOD.
Adulterated and misbranded food.
  Wrongful death.
    Breach of warranty of purity or fitness, §11-7-13.

FORCIBLE ENTRY AND DETAINER, §§11-25-1 to 11-25-119.
Complaints.
  County courts, §11-25-105.
  Justice courts, §11-25-5.
County courts, §§11-25-101 to 11-25-119.
  Complaints, §11-25-105.
  Crops.
    Growing crops, §11-25-115.
  Forms.
    Complaint, §11-25-105.
    Warrant, §11-25-107.
  Judgments.
    Judgment for defendant, §11-25-117.
    Judgment for plaintiff, §11-25-113.
    Not bar, §11-25-119.
  Limitation of actions, §§11-25-101, 11-25-103.
  Rent, §11-25-111.
  Warrants, §11-25-107.
    Execution of warrant, §11-25-109.

FORCIBLE ENTRY AND DETAINER —Cont'd
County courts —Cont'd
  Who entitled to remedy, §§11-25-101, 11-25-103.
Crops.
  County courts.
    Growing crops, §11-25-115.
  Justice courts.
    Growing crops, §11-25-25.
Depositions.
  Justice courts, §11-25-15.
Judgments.
  County courts, §§11-25-113, 11-25-117, 11-25-119.
  Justice courts, §§11-25-23, 11-25-27, 11-25-31.
Justice courts, §§11-25-1 to 11-25-31.
  Complaints, §11-25-5.
  Crops.
    Growing crops, §11-25-25.
  Depositions, §11-25-15.
  Forms.
    Complaint, §11-25-5.
    Warrant, §11-25-7.
  Judges.
    Duties, §11-25-17.
  Judgments.
    Judgment for defendant for cost, §11-25-27.
    Judgment for plaintiff, §11-25-23.
    Not conclusive in another action, §11-25-31.
  Limitation of actions, §§11-25-1, 11-25-3.
  Powers of court, §11-25-17.
  Rent.
    Recovery of rent, §11-25-21.
  Tax sales.
    Purchaser at sale for taxes, §11-25-3.
  Trial, §11-25-19.
    Holding court for, §11-25-17.
  Warrants, §11-25-7.
    How directed and executed, §11-25-11.
  Who entitled to remedy, §§11-25-1, 11-25-3.
  Witnesses.
    Depositions, §11-25-15.
    Process to bring witnesses before court, §11-25-17.
    Subpoenas, §11-25-13.
  Writ of possession, §11-25-23.
Limitation of actions.
  County court, §§11-25-101, 11-25-103.

FORCIBLE ENTRY AND DETAINER —Cont'd
Limitation of actions —Cont'd
  Justice courts, §§11-25-1, 11-25-3.
Rent.
  County courts, §11-25-111.
  Justice courts.
    Recovery of rent, §11-25-21.
Subpoenas.
  Justice courts.
    Witnesses, §11-25-13.
Warrants.
  County courts, §11-25-107.
    Execution of warrant, §11-25-109.
  Justice courts, §11-25-7.
    How directed and executed, §11-25-11.
Witnesses.
  Justice courts.
    Depositions, §11-25-15.
    Process to bring witnesses before court, §11-25-17.
    Subpoenas, §11-25-13.

FORECLOSURE.
Judicial sale.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.

FOREIGN JUDGMENTS.
Interstate enforcement, §§11-7-301 to 11-7-309.
  Alternative rights of judgment creditor, §11-7-309.
  Definition of foreign judgment, §11-7-301.
  Effect of filing, §11-7-303.
  Execution, §11-7-305.
    Stay on appeal, §11-7-307.
  Filing of copy, §11-7-303.
    Affidavit of filing, §11-7-305.
    Notice, §11-7-305.

FOREST FIRES.
Venue of actions, §11-11-3.

FORMS.
Confession of judgment.
  Offer, §11-7-181.
Interpleader.
  Claimant's affidavit, §11-23-27.
  Claimant's bond, §11-23-29.
Judgments and decrees.
  Confession of judgment.
    Offer, §11-7-181.
  The Judgment Roll, captions, §11-7-189.

FORMS —Cont'd
Justice courts.
  Execution of judgment, §11-9-133.
  Judgment and decrees.
    Entry of judgment, §11-9-123.
  Witnesses.
    Attachment for a witnesses, §11-9-121.
    Judgment nisi against defaulting witnesses, §11-9-117.
    Scire facias for defaulting witness, §11-9-119.
Unlawful entry and detainer.
  Complaint.
    County courts, §11-25-105.
    Justice courts, §11-25-5.
  Warrant.
    County courts, §11-25-107.
    Justice courts, §11-25-7.

FRAUD.
Confession of judgment.
  Absolutely void if tainted with, §11-7-185.
Partition of realty, §11-21-1.
Quieting title.
  Confirmation of state land patents.
    Effect of fraud, §11-17-9.

FRAUDULENT TRANSFERS.
Chancery courts.
  Creditors may attack fraudulent conveyances, §11-5-75.
Injunctions.
  Chancery courts.
    Issuance of writ of injunction, §11-5-75.
Jurisdiction.
  Chancery courts.
    Attack by creditors on fraudulent conveyances, §11-5-75.

FRIVOLOUS ACTIONS.
Assessment for filing frivolous claim, §11-1-54.
Attorneys at law.
  Assessment for filing frivolous claim, §11-1-54.

FUNERAL EXPENSES.
Wrongful death.
  Recovery as damages, §11-7-13.

G

GARNISHMENT.
Chancery courts.
  Decrees for money, §11-5-81.

GOOD FAITH.
Chancery court.
  Reopening judgment rendered on publication only, §11-5-91.

GOOD SAMARITANS.
Medical professionals, volunteers in school programs, §11-1-71.

GUARDIANSHIPS AND CONSERVATORSHIPS.
Actions.
  Venue of actions against guardians, §11-11-9.
Partition of realty.
  Infant or person of unsound mind as party, §11-21-5.
Sale of realty under decree.
  Death of guardian or other person authorized.
    Who may sale or convey, §11-5-105.
Venue.
  Actions against guardians, §11-11-9.

H

HABEAS CORPUS.
Appeals to supreme court.
  Appeals returnable at any time, §11-3-3.

HABERE FACIAS POSSESSIONEM.
Chancery courts.
  Issuance of writ by clerk, §11-5-83.

HARRISON COUNTY.
Actions.
  Commencement of civil actions in each of two judicial districts, §11-1-53.
  Transfer of cases between judicial districts, §11-1-53.
Venue.
  Change of venue between judicial districts, §11-1-53.

HIGHWAY CONTRACTORS.
Arbitration of construction contracts, §§11-15-101 to 11-15-143.

HIGHWAYS, ROADS AND STREETS.
Highway construction and maintenance.
  Arbitration of contracts, §§11-15-101 to 11-15-143.

HOMESTEAD EXEMPTIONS.
Exemption from seizure or sale under execution or attachment.
  Partition of homestead property exempted from execution, §11-21-1.

HOSPITAL RECORDS.
Charges for patients photocopying patients' records, §11-1-52.

HOSPITALS AND OTHER HEALTH CARE FACILITIES.
Patients' records.
  Charges for patient photocopying, §11-1-52.

HUSBAND AND WIFE.
Wrongful death.
  Circuit courts.
    Persons entitled to sue for injuries producing death, §11-7-13.

I

IMMUNITY.
Medical malpractice.
  Prescription drugs approved by FDA.
    Immunity of medical professionals, §11-1-62.
Nurses.
  Volunteers in school programs, §11-1-71.
Physicians and surgeons.
  Volunteers in school programs, §11-1-71.
Premise owners.
  Death of independent contractor or contractor's employees, §11-1-66.
  Immunity from liability third party criminal acts, §11-1-66.

IMPROVEMENTS.
Mesne profits.
  Compensation for improvements, §§11-19-95, 11-19-97.
Partition of realty.
  New partition.
    Effect, §11-21-45.

INDEMNIFICATION.
Products liability cases.
  Cost of litigation to product seller, §11-1-63.

INDEPENDENT CONTRACTORS.
Death of contractor or contractor's employee.
  Immunity of premises owner, §11-1-66.

INJUNCTIONS, §§11-13-1 to 11-13-41.
Bonds, surety, §§11-13-3 to 11-13-9.
  Collection of taxes, §11-13-13.
  Judgments.
    Certain injunction bonds to operate as judgments, §11-13-33.
Collection of taxes, §§11-13-11 to 11-13-17.
  Bonds, surety, §11-13-13.
  Chancery court jurisdiction, §11-13-11.
  Dissolution of injunction, §§11-13-15, 11-13-17.
  Preference of case, §11-13-15.
Counties.
  Bond not required of county, §11-13-9.
Damages.
  Bond when injunction not to stay proceedings at law, §11-13-5.
Dissolution of injunction.
  Affidavits.
    Evidence at motion on hearing, §11-13-31.
  Collection of taxes, §§11-13-15, 11-13-17.
  Damages on dissolution of certain injunctions, §§11-13-35, 11-13-37.
  Effect.
    Dismissal of bill of complaint, §11-13-39.
  Evidence at hearing on motion, §11-13-31.
Evidence.
  Dissolution of injunction.
    Hearing on motion, §11-13-31.
  Necessity of evidence of complainant's equity and truth of allegations, §11-13-1.
Execution of judgments.
  Restoration of personal property levied on, §11-13-19.
  Stay of sale under execution.
    Bond, surety, §11-13-7.
Fraudulent conveyances.
  Chancery courts.
    Issuance of writ of injunction, §11-5-75.
Mortgages and deeds of trust.
  Restraining sale of personal property seized under mortgage or deed of trust.
    Restoration of property seized, §11-13-21.

INJUNCTIONS —Cont'd
Municipalities.
  Bond not required of municipality, §11-13-9.
Oaths.
  Complainant's equity and truth of allegations, §11-13-1.
Restoration of personal property levied on, §§11-13-19, 11-13-21.
Sexual assault.
  Costs of court.
    Assessment to perpetrator, exception, frivolous request, §11-13-41.
  Fees related to filing.
    Victim exempt, §11-13-41.
Stalking.
  Costs of court.
    Assessment to perpetrator, exception, frivolous request, §11-13-41.
  Fees related to filing.
    Victims exempt, §11-13-41.
Standard of proof.
  Adequacy of evidence, §11-13-1.
State of Mississippi.
  Bond not required of state, §11-13-9.
Taxation.
  Restraint of collection of taxes, §§11-13-11 to 11-13-17.

INTELLECTUAL DISABILITY.
Chancery court proceedings.
  Answer not required, §11-5-49.

INTEREST.
Usury.
  Confession of judgment.
    Absolutely void if tainted with usury, §11-7-185.

INTERPLEADER, §§11-23-1 to 11-23-29.
Affidavits.
  Form of claimant's affidavit, §11-23-27.
  How claim to property levied on interposed, §11-23-7.
Bonds, surety.
  Claimant, §11-23-7.
  Form of claimant's bond, §11-23-29.
  New bond may be required, §11-23-21.
Burden of proof.
  Plaintiff, §11-23-15.
Death.
  Laws applicable in case of death, §11-23-19.
Evidence.
  Value of property, §11-23-15.

INTERPLEADER —Cont'd
Execution of judgments.
  Issue to be made up, §11-23-11.
    Default in making up issue, §11-23-13.
  Procedure, §11-23-7.
  Stay of execution for value of property claimed, §11-23-9.
Forms.
  Claimant's affidavit, §11-23-27.
  Claimant's bond, §11-23-29.
Initiation of action, §11-23-1.
Judgments, §11-23-17.
Justice courts.
  Proceedings when bond not given, §11-23-25.
Officers.
  Applicability of proceedings, §11-23-3.
Procedure upon initiation of action, §11-23-1.
Sheriffs.
  Third-party proceedings applicable to officers, §11-23-3.
Stays.
  Execution stayed for value of property claimed, §11-23-9.
Venue.
  Change of venue in certain cases, §11-23-23.

INVESTIGATIONS.
Quieting title.
  Confirmation of state land patents.
    Duties of district attorneys and county attorneys, §11-17-15.

J

JOINDER OF PARTIES.
Ejectment.
  Defendant, §11-19-5.
Quieting title.
  Confirmation of tax title.
    Persons having or claiming interest in lands, §11-17-1.

JOINT TENANTS AND TENANTS IN COMMON.
Ejectment.
  Trial of action between cotenants, §11-19-85.
Partition of realty generally, §§11-21-1 to 11-21-45.

JUDGES.
Conflicts of interest.
  Venue when judge interested, §11-11-19.

JUDGES —Cont'd
Nonresident defendants.
  Before whom answers may be sworn, §11-5-31.
Oaths.
  Before whom oaths may be taken, §11-1-1.
Vacation.
  Proceedings in vacation, §11-1-16.

JUDGMENTS AND DECREES.
Arbitration.
  Construction contracts, §§11-15-137, 11-15-139.
  Rendition of judgment on award, §11-15-31.
Chancery courts.
  Decree to operate as judgment of circuit court, §11-5-79.
  Payment of money.
    Fieri facias or garnishment on judgment for, §11-5-81.
Circuit courts.
  Bonds for money.
    Judgment on, §11-7-173.
  Death of defendant after judgment, §11-7-29.
  Enrollment of judgments, §11-7-189.
    Lien of enrolled judgment, §§11-7-191 to 11-7-199.
  Foreign judgments.
    Interstate enforcement, §§11-7-301 to 11-7-309.
  Lien of enrolled judgment, §§11-7-191 to 11-7-199.
    Forfeiture of priority of lien, §11-7-193.
    Generally, §11-7-191.
    Growing crop not subject to judgment lien, §11-7-199.
    Requirement of enrollment, §§11-7-195, 11-7-197.
  Release of errors.
    Judgment on confession as, §11-7-187.
  Remedial orders as to property, §11-7-169.
  Revival of judgments.
    Scire facias, §11-7-201.
  Satisfaction of judgment, §11-7-189.
  Ships and vessels.
    Liability for causing death or injury, §11-7-175.
Confession of judgment, §§11-7-181 to 11-7-185.

JUDGMENTS AND DECREES —Cont'd

Death.
  Circuit courts.
    Death of defendant after judgment, §11-7-29.
Decree not entered within required time in circuit courts.
  Right of appeal to supreme court, §11-1-17.
Ejectment.
  Recordation as deed, §11-19-105.
  Res judicata, §11-19-103.
Excess may be released by plaintiff, §11-1-21.
Forcible entry and detainer.
  County courts, §§11-25-113, 11-25-117, 11-25-119.
  Justice courts, §§11-25-23, 11-25-27, 11-25-31.
Foreign judgments.
  Interstate enforcement, §§11-7-301 to 11-7-309.
Injunction bonds.
  When to operate as a judgment, §11-13-33.
Justice courts, §11-9-127.
  Defaulting witnesses.
    Entry of final judgment, §11-9-123.
    Judgment nisi, §11-9-117.
  Forcible entry and detainer, §§11-25-23, 11-25-27, 11-25-31.
  Lien of judgment.
    Enrolled judgment, §11-9-129.
  Res judicata, §11-9-137.
Liens.
  Circuit courts.
    Enrolled judgment, §§11-7-191 to 11-7-199.
  Justice courts.
    Enrolled judgment, §11-9-129.
Partition of realty, §11-21-3.
  Final judgment, §11-21-35.
  Judgment confirming petition, §11-21-35.
  Masters.
    Judgment appointing, §11-21-15.
  Recording of judgments, §11-21-37.
Trial of right of property, §11-23-17.

JUDICIAL SALES.
Bonds, surety.
  Injunction to stay proceedings, §11-13-7.
Chancery courts.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.

JUDICIAL SALES —Cont'd
Injunction to stay proceedings.
  Bond required, §11-13-7.
Property tax collection.
  Confirmation of tax title, §11-17-1.
  Forcible entry and detainer.
    Purchaser of tax lands, §11-25-103.
    Right of action at purchaser at sale for taxes, §11-25-3.

JURISDICTION.
Arbitration.
  Construction contracts.
    Circuit courts, §11-15-129.
Chancery courts.
  Fraudulent conveyances.
    Attack by creditors on fraudulent conveyances, §11-5-75.
  Partition of realty, §11-21-3.
  Want of jurisdiction.
    Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.
Circuit courts.
  Construction contracts.
    Arbitration, §11-15-129.
  Want of jurisdiction.
    Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.
Ejectment, §11-19-3.
Fraudulent conveyances.
  Chancery courts.
    Attack by creditors on fraudulent conveyances, §11-5-75.
Justice courts, §11-9-101.
  Court with jurisdiction of subject matter but not venue, §11-11-17.
Lack of jurisdiction.
  Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.
Supreme court of Mississippi.
  Want of jurisdiction.
    Grounds on which appeal not be dismissed for, §11-3-5.
    Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.
Vacation.
  Proceedings in vacation, §11-1-16.

JURY AND JURY TRIAL.
Chancery courts.
  Change of venue in jury cases, §11-5-5.
  Trial of issue by jury, §11-5-3.

JURY AND JURY TRIAL —Cont'd
Circuit courts.
  Deliberations.
    Papers carried out by jury, §11-7-151.
  Instructions, §11-7-155.
  Negligence and contributory negligence.
    Questions for jury, §11-7-17.
  Officers of court not to converse with jurors, §11-7-149.
  Papers carried out by jury, §11-7-151.
  Stating case to jury, §11-7-147.
  Verdicts, §§11-7-157 to 11-7-163.
Contributory negligence.
  Question for jury, §11-7-17.
Instructions to jury.
  Circuit courts, §11-7-155.
Justice courts.
  Trial by jury, §§11-9-143 to 11-9-147.
    Delinquent jurors fined, §11-9-147.
    More than one case, §11-9-145.
    Number of jurors, §11-9-143.
    Peremptory challenges, §11-9-143.
    Summons, §11-9-143.
Negligence.
  Questions for jury, §11-7-17.

JURY INSTRUCTIONS.
Chancery court, §11-5-3.
  Circuit courts, §11-7-155.

JUSTICE COURTS.
Actions.
  Commencement of suits in civil cases, §11-9-105.
Attachment.
  Proceedings in attachment, §11-9-135.
Clerks of court.
  Assignment of civil cases to judges, §11-9-105.
Commencement of action, §11-9-105.
Constables.
  Service of process.
    Execution by sheriff when process not returned by constable, §11-9-107.
    Return of process, §11-9-113.
Execution of judgments, §11-9-127.
  Form of execution, §11-9-133.
  Issuance of execution.
    Time for, §11-9-131.
  Stay, §11-9-139.
    Effect, §11-9-141.
Forcible entry and detainer, §§11-25-1 to 11-25-31.

JUSTICE COURTS —Cont'd
Forms.
  Defaulting witnesses.
    Attachment for witness, §11-9-121.
    Entry of final judgment, §11-9-123.
    Judgment nisi against, §11-9-117.
    Scire facias, §11-9-119.
  Execution, §11-9-133.
Interpleader.
  Proceedings when bond not given, §11-23-25.
Judges.
  Assignment of civil cases to, §11-9-105.
  Nonresident defendants.
    Before whom answers may be sworn, §11-5-31.
  Oaths.
    Before whom oaths may be taken, §11-1-1.
Judgments, §11-9-127.
  Defaulting witnesses.
    Entry of final judgment, §11-9-123.
    Judgment nisi, §11-9-117.
  Forcible entry and detainer, §§11-25-23, 11-25-27, 11-25-31.
  Lien of judgment.
    Enrolled judgment, §11-9-129.
  Res judicata, §11-9-137.
Jurisdiction, §11-9-101.
  Court with jurisdiction of subject matter but not venue, §11-11-17.
Jury.
  Trial by jury, §§11-9-143 to 11-9-147.
    Delinquent jurors fined, §11-9-147.
    More than one case, §11-9-145.
    Number of jurors, §11-9-143.
    Peremptory challenges, §11-9-143.
    Summons, §11-9-143.
Liens.
  Judgment liens.
    Enrolled judgments, §11-9-129.
  Proceedings for enforcement of statutory liens, §11-9-135.
Multiple defendants.
  Venue, §11-9-103.
Partition of personalty, §§11-21-71 to 11-21-81.
Replevin.
  Proceedings in replevin, §11-9-135.
Res judicata.
  Judgment on merits, §11-9-137.
Scire facias.
  Defaulting witness, §11-9-119.

JUSTICE COURTS —Cont'd
Service of process.
  Appointment of persons to execute process, §11-9-109.
    Delivery of property and process to clerk's office, §11-9-111.
  Sheriff or constable, §11-9-107.
    Return of process by, §11-9-113.
Setoffs.
  Filing of setoff on return day before trial, §11-9-125.
Sheriffs.
  Service of process, §11-9-107.
    Return of process, §11-9-113.
Stays.
  Execution of judgments, §11-9-139.
    Effect of stay, §11-9-141.
Subpoenas.
  Witnesses, §11-9-115.
    Forcible entry and detainer, §11-25-13.
Trespass.
  Disclaiming title and tendering of amends in action for trespass, §11-7-73.
Trial, §11-9-127.
  Forcible entry and detainer, §11-25-19.
    Holding court for trial, §11-25-17.
  Jury trial, §§11-9-143 to 11-9-147.
Two or more defendants.
  Venue, §11-9-103.
Unlawful entry and detainer, §§11-25-1 to 11-25-31.
Venue, §§11-9-101, 11-9-103.
  Court with jurisdiction of subject matter but not venue, §11-11-17.
Witnesses.
  Defaulting witness.
    Attachment for witness, §11-9-121.
    Entry of final judgment, §11-9-123.
    Judgment nisi against, §11-9-117.
    Scire facias, §11-9-119.
  Forcible entry and detainer.
    Depositions, §11-25-15.
    Process to bring witnesses before court, §11-25-17.
    Subpoenas, §11-25-13.
  Subpoenas, §11-9-115.
    Forcible entry and detainer, §11-25-13.

L

LANDLORD AND TENANT.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Eviction.
  Forcible entry and detainer, §§11-25-1 to 11-25-119.
Premise owners.
  Immunity from liability for certain criminal acts of third party, §§11-1-66, 11-1-66.1.
Residential landlord and tenant act.
  Eviction.
    Forcible entry and detainer, §§11-25-1 to 11-25-119.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.

LANDOWNER'S LIABILITY.
Death of independent contractor or contractor's employees, §11-1-66.
Landowners protection act.
  Immunity for acts of third parties, §11-1-66.1.

LAND PATENTS.
Quieting title.
  Confirmation of state land patents, §§11-17-3 to 11-17-17.

LEGISLATURE.
Attorneys at law.
  Continuance of action or proceeding where counsel is legislator, §11-1-9.
Legislator lawyers.
  Continuance of actions or proceedings, §11-1-9.

LIENS.
Chancery courts.
  Receivers, liens for payment for services, §11-5-167.
  Sale of realty under decrees.
    Balance due to complainant after sale to satisfy lien.
      Decree for balance, §11-5-111.
    Lien on land sold on credit, §11-5-97.
Ejectment.
  Mesne profits and value of improvements, §11-19-97.

LIENS —Cont'd
Judgments.
Circuit courts.
Enrolled judgment, §§11-7-191 to 11-7-199.
Justice courts.
Enrolled judgment, §11-9-129.
Justice courts.
Judgment liens.
Enrolled judgments, §11-9-129.
Proceedings for enforcement of statutory liens, §11-9-135.
Partition of realty.
Binding effect of lien created by party, §11-21-39.
Owelty a lien, §11-21-33.
Receivers.
Liens for payment for services, §11-5-167.

LIFE ESTATES.
Ejectment.
Default of tenant for life not to prejudice, §11-19-13.

LIMITATION OF ACTIONS.
Forcible entry and detainer.
County court, §§11-25-101, 11-25-103.
Justice courts, §§11-25-1, 11-25-3.

LOCAL GOVERNMENTS.
Quieting title.
Confirmation of title or interest granted by political subdivision, §§11-17-19 to 11-17-29.
Real property.
Quieting title.
Confirmation of title or interest granted by political subdivision, §§11-17-19 to 11-17-29.

M

MALPRACTICE.
Medical malpractice.
Certificate of consultation to be filed with complaint, §11-1-58.
Damages, §11-1-59.
Limitation on noneconomic damages, §11-1-60.
Expert witness in action against physician, §11-1-61.
Prescription drugs approved by FDA.
Immunity of medical professionals, §11-1-62.

MANDAMUS.
Appeals.
Supreme court, appeals returnable at any time, §11-3-3.

MAPS AND PLATS.
Partition of realty.
Land to be divided, §11-21-21.

MASTERS.
Oaths.
Before whom oaths may be taken, §11-1-1.
Partition of realty.
Compensation, §11-21-29.
Judgment appointing masters, §11-21-15.
Oath, §11-21-17.
Partition without masters, §11-21-13.
Powers and duties, §§11-21-19 to 11-21-23.
Report, §11-21-25.
Sale of land.
Appointment of master to make sale, §11-21-11.
Vacancy among masters, §11-21-15.
Sale of realty under decree.
Death of master or other person authorized.
Who may sell or convey, §11-5-105.

MAYORS.
Nonresident defendants.
Before whom answers may be sworn, §11-5-31.
Oaths.
Before whom oaths may be taken, §11-1-1.

MEDIATION.
Arbitration.
Construction contracts, §§11-15-101 to 11-15-143.
General provisions, §§11-15-1 to 11-15-37.

MEDICAL EXPENSES.
Wrongful death.
Recovery as damages, §11-7-13.

MEDICAL LICENSURE.
State board of medical licensure.
Actions.
Venue of actions against board, §11-11-15.
Venue.
Actions against board, §11-11-15.

MEDICAL MALPRACTICE.
Certificate of consultation to be filed with complaint, §11-1-58.

MEDICAL MALPRACTICE —Cont'd
Damages, §11-1-59.
  Limitation on noneconomic damages, §11-1-60.
Expert witnesses, §11-1-61.
Prescription drugs approved by FDA.
  Immunity of medical professionals, §11-1-62.

MEDICAL RECORDS.
Charges for patients photocopying, §11-1-52.

MENTAL HEALTH.
Actions.
  Answer not required in response, §11-5-49.
Arbitration.
  Persons who may not submit to arbitration, §11-15-1.
Partition of realty.
  Parties to proceedings, §11-21-5.

MERCHANTABILITY WARRANTY.
Disclaimer of liability, §11-7-18.

MESNE PROFITS.
Ejectment, §§11-19-95, 11-19-97.
Improvements.
  Compensation for improvements, §§11-19-95, 11-19-97.

MINES AND MINERALS.
Quieting title.
  Nonresident or unknown owners of mineral interests.
    Receiver for, §§11-17-33, 11-17-34.
Receivers.
  Quieting title.
    Nonresident or unknown owners of mineral interests, §§11-17-33, 11-17-34.

MONEY.
Partition of realty.
  Owelty, §§11-21-13, 11-21-23, 11-21-33.

MORTGAGES AND DEEDS OF TRUST.
Injunctions.
  Restraining sale of personal property seized under mortgage or deed of trust.
    Restoration of property seized, §11-13-21.

MOTIONS.
Appeals.
  Motion to discharge supersedeas, §11-3-21.
Injunctions.
  Dismissal to dismiss injunction, §11-13-31.

MUNICIPAL CLERKS.
Oaths.
  Before whom oaths may be taken, §11-1-1.

MUNICIPALITIES.
Injunctions.
  Bond not required of municipality, §11-13-9.

MUTUAL DEALINGS.
Balance on death of one party, §11-7-67.

N

NEGLIGENCE.
Assumption of risk.
  Doctrine abolished as to employee when master is negligent, §11-7-19.
Circuit courts.
  Assumption of risk.
    Abolition of doctrine as to employee when master is negligent, §11-7-19.
  Contributory negligence.
    No bar to recovery of damages, §11-7-15.
    Question for jury, §11-7-17.
  Jury questions, §11-7-17.
  Privity.
    Unnecessary to maintain actions brought on account of negligence, §11-7-20.
Jury.
  Questions for jury, §11-7-17.
Premise owners.
  Immunity from liability for third party criminal acts, §§11-1-66, 11-1-66.1.
Prescription drugs approved by FDA.
  Immunity of medical professionals, §11-1-62.
Privity.
  Unnecessary to maintain actions brought on account of negligence, §11-7-20.

NONRESIDENTS.
Perishable commodities.
  Seizure by legal process.
    Process as to nonresident owners, §11-1-49.
Venue, §11-11-3.

NOTARIES PUBLIC.
Oaths.
  Before whom oaths may be taken, §11-1-1.

NOTICE.
Arbitration.
  Construction contracts.
    Hearing by arbitrators, §11-15-113.
    Notice of intention to arbitrate, §11-15-107.
  Hearing by arbitrators.
    Construction contracts, §11-15-113.
    Notice to parties, §§11-15-5, 11-15-7.
Chancery courts.
  Receivers.
    Appointment, §§11-5-153, 11-5-155.
Circuit courts.
  Bills of exception.
    Amendment, §11-7-211.
Ejectment.
  Landlord to be notified, §11-19-9.
Quieting title.
  Confirmation of tax title, §11-17-1.
Supreme court of Mississippi.
  Supersedeas.
    Motion to discharge supersedeas, §11-3-21.

NURSES.
Immunities.
  Volunteers in school programs, §11-1-71.

NURSING HOMES.
Charges for patient photocopying patient's records, §11-1-52.
Patient's records.
  Charges for patient photocopying, §11-1-52.

O

OATHS OR AFFIRMATIONS.
Actions.
  Agent or attorney.
    Oath sufficient in all cases, §11-1-3.
  Before whom oaths may be taken, §11-1-1.

OATHS OR AFFIRMATIONS —Cont'd
Agents.
  Oath of agent sufficient where oath of party required, §11-1-3.
Arbitration.
  Arbitrators, §11-15-9.
  Witnesses, §11-15-13.
Attorneys at law.
  Oath of attorney sufficient where oath or affirmation of party required, §11-1-3.
Depositions.
  Before whom oaths may be taken, §11-1-1.
Injunctions.
  Complainant's equity and truth of allegations, §11-13-1.
Partition of realty.
  Masters, §11-21-17.

OFFER OF CONFESSION OF JUDGMENT, §§11-7-181 to 11-7-185.

OPENING STATEMENTS.
Circuit courts, §11-7-147.

OWELTY.
Partition of realty, §§11-21-13, 11-21-23.
  Lien, §11-21-33.

OWNER'S LIABILITY.
Death of independent contractor or contractor's employees, §11-1-66.
Landowners protection act.
  Immunity for acts of third parties, §11-1-66.1.

P

PARENT AND CHILD.
Action for seduction of daughter, §11-7-11.
Seduction.
  Action for seduction of child, §11-7-11.
Wrongful death.
  Circuit courts.
    Persons entitled to sue for injuries producing death, §11-7-13.

PARTIES.
Death.
  Parties on bonds having force of judgment, §§11-1-31 to 11-1-35.
Ejectment.
  Defendant.
    Landlord to be admitted to defend, §11-19-9.

PARTIES —Cont'd
Ejectment —Cont'd
  Defendant —Cont'd
    Reversioner or remainderman admitted to defend, §11-19-11.
    Who may be made defendant, §11-19-5.
Frivolous actions.
  Assessment for filing frivolous claim, §11-1-54.
Partition of realty, §11-21-5.
Quieting title.
  Clouds upon title.
    Removing, §11-17-31.
  Confirmation of state land patents.
    Who may proceed as complainant, §11-17-3.
  Confirmation of tax title, §11-17-1.
  Confirmation of title or interest granted by political subdivision, §11-17-19.
  Confirmation of titles generally, §11-17-29.

PARTITION.
Personalty, §§11-21-71 to 11-21-81.
  Allotment.
    Partition by county court or justice court, §11-21-75.
  Appeals.
    County court or justice court judgment.
      Appeal to circuit court, §11-21-81.
  Bonds, surety.
    County court or justice court.
      Petitioner, §11-21-77.
  Chancery courts, §11-21-71.
  County courts, §§11-21-73 to 11-21-81.
  Justice courts, §§11-21-73 to 11-21-81.
  Sale of property.
    County court or justice court.
      Property incapable of division in kind, §§11-21-73, 11-21-79.
  Seizure of property.
    County court or justice court.
      Writ to seize property, §11-21-77.
Realty, §§11-21-1 to 11-21-45.
  Agreement of parties, §11-21-1.
  Appraisals and appraisers.
    Sale of land.
      Court may cause appraisal to be made, §11-21-11.
      Land not capable of division, §11-21-27.
  Arbitration, §11-21-1.
  Attorneys' fees, §11-21-31.

PARTITION —Cont'd
Realty —Cont'd
  Ballots.
    Allotment of shares by ballot, §11-21-21.
  Estates in land.
    Paramount rights not affected, §11-21-41.
  Eviction.
    Party evicted to have partition of residue, §11-21-43.
  Ex parte petitions, §11-21-7.
  Improvements.
    New partition.
      Effect, §11-21-45.
  Institution and conduct of proceedings as in other suits in chancery, §11-21-7.
  Judgments, §11-21-3.
    Final judgment, §11-21-35.
    Judgment confirming petition, §11-21-35.
    Masters.
      Judgment appointing, §11-21-15.
    Recording of judgments, §11-21-37.
  Liens.
    Binding effect of lien created by party, §11-21-39.
    Owelty a lien, §11-21-33.
  Masters.
    Compensation, §11-21-29.
    Judgment appointing masters, §11-21-15.
    Oath, §11-21-17.
    Partition without masters, §11-21-13.
    Powers and duties, §§11-21-19 to 11-21-23.
    Report, §11-21-25.
    Sale of land.
      Appointment of master to make sale, §11-21-11.
    Vacancy among masters, §11-21-15.
  Mentally ill.
    Parties to proceedings, §11-21-5.
  Minors.
    Parties to proceedings, §11-21-5.
  Money paid by one or more cotenants.
    Owelty, §§11-21-13, 11-21-23, 11-21-33.
  New partition, §11-21-45.
  Owelty, §§11-21-13, 11-21-23.
    Lien, §11-21-33.
  Paramount rights not affected, §11-21-41.

PARTITION —Cont'd
Realty —Cont'd
  Parties, §11-21-5.
  Plats.
    Land to be divided, §11-21-21.
  Reports.
    Masters, §11-21-25.
  Sale of lands.
    Land not capable of division, §11-21-27.
    Order of court, §11-21-11.
  Surveys, §11-21-19.
  Title.
    Controverted title and all equities disposed of, §11-21-9.
  Venue.
    Judgment of chancery court, §11-21-3.

PARTNERSHIPS.
Pleadings.
  Averments partner contract in partnership name, §11-7-43.

PATIENTS' RECORDS.
Charges for patients photocopying records, §11-1-52.

PERISHABLES.
Seizure by legal process, §11-1-43.
  Filing complaint, §11-1-45.
  Nonresident owners.
    Process as to, §11-1-49.
  Possessor presumed to be owner, §11-1-47.

PERSONAL PROPERTY.
Choses in action.
  Sale as other property, §11-7-7.
Execution of judgments.
  Injunctions.
    Restoration of personal property levied on, §11-13-19.
Injunctions.
  Restoration of personal property levied on, §§11-13-19, 11-13-21.
Interpleader, §§11-23-1 to 11-23-29.
Partition of property.
  General provisions, §§11-21-71 to 11-21-81.
Trial of right of property, §§11-23-1 to 11-23-29.
Venue of actions, §11-5-1.

PETITIONS.
Partition of realty.
  Ex parte petitions, §11-21-7.

PHYSICIANS AND SURGEONS.
Charges for patient photocopying patient's records, §11-1-52.
Depositions.
  Charges for deposition relating to patient physician treating or has treated, §11-1-52.
Immunities.
  Volunteers in school programs, §11-1-71.
Medical malpractice.
  Certificate of consultation to be filed with complaint, §11-1-58.
  Damages, §11-1-59.
    Limitation on noneconomic damages, §11-1-60.
  Expert witnesses, §11-1-61.
Patient's records.
  Charges for patient photocopying, §11-1-52.
Volunteers.
  School programs, immunity, §11-1-71.
Witnesses.
  Actions against physician, expert witnesses, §11-1-61.

PLATS.
Partition of realty.
  Land to be divided, §11-21-21.

PLEADINGS.
Assignment of cases for trial.
  Responsive pleading required, §11-1-56.
Chancery courts.
  Answers, §§11-5-31, 11-5-49, 11-5-51.
Filing of pleadings and other papers with court.
  Filing all related papers together, §11-1-5.
Injunctions.
  Sufficiency of evidence, §11-13-1.
Private way.
  How pleaded, §11-7-107.

POLITICAL SUBDIVISIONS.
Suits to confirm title or interest.
  Confirmation of title or interest granted by political subdivision, §§11-17-19 to 11-17-29.
  General provisions, §§11-17-1 to 11-17-37.

PREMISES LIABILITY.
Criminal acts of third party.
  Immunity of owner, §§11-1-66, 11-1-66.1.

PREMISES LIABILITY —Cont'd
Death of independent contractor or contractor's employees, §11-1-66.
Landowners protection act.
  Immunity for acts of third parties, §11-1-66.1.
Third-party criminal acts.
  Immunity of owner, §§11-1-66, 11-1-66.1.

PRESCRIPTIONS.
Medical malpractice.
  Prescription drugs approved by FDA.
    Immunity of medical professionals, §11-1-62.
Wrongful death.
  Breach of warranty of purity or fitness, §11-7-13.

PRESUMPTIONS.
Perishable commodities.
  Seizure by legal process.
    Possessor presumed to be owner, §11-1-47.

PRISON TERMS.
Bailiffs.
  Contempt.
    Conversing with jurors, §11-7-149.
Circuit courts.
  Officer of court conversing with jurors, §11-7-149.
Jury.
  Circuit courts.
    Officers conversing with jurors, §11-7-149.

PRIVITY.
Actions where privity not necessary, §11-7-20.

PRODUCTS LIABILITY.
Attorneys' fees.
  Indemnification of seller, §11-1-63.
Burden of proof.
  Conditions for liability, §11-1-63.
Conditions for liability, §11-1-63.
Cost of litigation.
  Indemnification of seller, §11-1-63.
Defective design.
  Proof required, §11-1-63.
Defective product.
  What constitutes, §11-1-63.
Firearms.
  Authority to sue reserved to state, §11-1-67.
Indemnification by manufacturer of product seller.
  Cost of litigation, §11-1-63.

PRODUCTS LIABILITY —Cont'd
Privity.
  Actions not requiring, §11-7-20.
Product failed to contain adequate warning or instructions.
  Proof required, §11-1-63.
Proof required, §11-1-63.
Punitive damages.
  Determining liability, §11-1-65.
Sellers.
  Liability, proof required, §11-1-63.
  Punitive damages.
    Determining liability, §11-1-65.

PROPERTY TAXES.
Collection of taxes.
  Bonds, surety.
    Injunction to stay proceedings, §11-13-13.
  Injunction to stay proceedings, §§11-13-13 to 11-13-19.
Quieting title.
  Sale of land for taxes.
    Proceedings to confirm tax title, §11-17-1.

PUBLICATION OF NOTICE.
Chancery courts.
  Reopening of judgment rendered on publication only, §11-5-91.

PUBLIC BUILDINGS.
Construction and improvement of public facilities.
  Arbitration of construction contracts, §§11-15-101 to 11-15-143.

PUBLIC UTILITIES.
Construction contracts.
  Arbitration, §§11-15-101 to 11-15-143.

PUNITIVE DAMAGES, §11-1-65.
Amount.
  Determining, factors, limitation, §11-1-65.
Compensatory damages.
  Award required, §11-1-65.
Excessive award.
  Determining, factors, §11-1-65.
Limitation, §11-1-65.
Proof required for awarding, §11-1-65.
Reasonableness.
  Court to ascertain before entering judgment, §11-1-65.
Seller of product, liability, §11-1-65.
Submission of issue to jury.
  Court to determine, §11-1-65.

Q

QUIETING TITLE, §§11-17-1 to 11-17-37.

Appeals.
  Confirmation of state land patents, §11-17-11.
  Confirmation of title or interest granted by political subdivision, §11-17-25.

Commencement of action, §11-17-31.

Confirmation of state land patents, §§11-17-3 to 11-17-17.
  Appeals, §11-17-11.
  Attorney general.
    Duties, §11-17-5.
  Construction of provisions, §11-17-17.
  County attorneys.
    Duties, §11-17-15.
  Decree, §11-17-9.
    No decree pro confesso to be taken against state, §11-17-7.
    Res judicata, §11-17-13.
  Deraignment of title of complainant.
    Not required, §11-17-3.
  District attorneys.
    Duties, §11-17-15.
  Fraud.
    Effect, §11-17-9.
  Investigations.
    Duties of district attorneys and county attorneys, §11-17-15.
  Payment of purchase price.
    Effect of failure to pay, §11-17-9.
  Powers of court, §11-17-7.
  Res judicata, §11-17-13.
  Venue, §11-17-3.
  Who may proceed as complainant, §11-17-3.

Confirmation of tax title, §11-17-1.

Confirmation of title or interest granted by political subdivision, §§11-17-19 to 11-17-29.
  Appeals, §11-17-25.
  Applicability of provisions, §11-17-27.
  Decree, §11-17-23.
  Default judgments, §11-17-21.
  Deraignment of title of complainant.
    Not required, §11-17-19.
  Generally, §11-17-29.
  Parties, §11-17-19.
  Res judicata, §11-17-23.
  Rules of civil procedure.
    Proceedings governed by, §11-17-21.
  Venue, §11-17-19.

QUIETING TITLE —Cont'd

Decrees.
  Confirmation of state land patents, §§11-17-7, 11-17-9.
  Confirmation of tax title, §11-17-1.
  Confirmation of title or interest granted by political subdivision, §11-17-23.
  Possession.
    Decrees as to, §11-17-37.
  Recordation as deeds in certain cases, §11-17-35.
  Rent.
    Decrees as to, §11-17-37.

Deeds.
  Recordation of decrees as deeds in certain cases, §11-17-35.

Deraignment of title of complainant, §11-17-35.
  Confirmation of state land patents.
    Not required, §11-17-3.
  Confirmation of title or interest granted by political subdivision.
    Not required, §11-17-19.

Equitable title holders, §11-17-31.

Joinder.
  Confirmation of tax title.
    Persons having or claiming interest in lands, §11-17-1.

Mines and minerals.
  Nonresident or unknown owners of mineral interests.
    Receiver for, §§11-17-33, 11-17-34.

Notice.
  Confirmation of tax title, §11-17-1.

Pleadings.
  Commencement of action, §11-17-31.

Political subdivisions.
  Confirmation of title or interest granted by, §§11-17-19 to 11-17-29.

Proof of title.
  Deraignment generally, §11-17-35.
    Confirmation, §§11-17-3, 11-17-19.

Receivers.
  Mineral interests.
    Nonresident or unknown owners, §§11-17-33, 11-17-34.

Relief which may be granted, §11-17-37.

Removing cloud on title, §11-17-31.
  Venue of action, §11-5-1.

Tax title.
  Proceedings to confirm, §11-17-1.

Tax title claimants, §11-17-31.

QUIETING TITLE —Cont'd
Venue.
  Confirmation of real estate title, §11-5-1.
  Confirmation of state land patents, §11-17-3.
  Confirmation of title or interest granted by political subdivision, §11-17-19.

QUO WARRANTO.
Appeals to supreme court.
  Appeals returnable at any time, §11-3-3.

R

RAILROAD ACCIDENTS.
Assumption of risk.
  Applicability of rule, §11-7-19.

RAPE.
Injunctive relief seeking protection.
  Court costs related to filing by victim of sexual assault.
    Assessment to perpetrator, exception, frivolous request, §11-13-41.
  Fees related to filing.
    Victim of sexual assault exempt, §11-13-41.

REAL ESTATE SALES.
Chancery courts.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.

REAL PROPERTY.
Chancery courts.
  Sale of realty under decrees, §§11-5-93 to 11-5-117.
Ejectment.
  General provisions, §§11-19-1 to 11-19-105.
Judicial sales, §§11-5-93 to 11-5-117.
  Operation as conveyance, §11-5-85.
Local governments.
  Quieting title.
    Confirmation of title or interest granted by political subdivision, §§11-17-19 to 11-17-29.
Partition.
  General provisions, §§11-21-1 to 11-21-45.
Quieting title, §§11-17-1 to 11-17-37.

REAL PROPERTY —Cont'd
Sales.
  Chancery courts.
    Sale of realty under decrees, §§11-5-93 to 11-5-117.
Unlawful entry and detainer.
  General provisions, §§11-25-1 to 11-25-119.
Venue of actions, §11-5-1.

RECEIVERS.
Chancery courts, §§11-5-151 to 11-5-167.
Mines and minerals.
  Quieting title.
    Nonresident or unknown owners of mineral interests, §§11-17-33, 11-17-34.
Quieting title.
  Mineral interests.
    Nonresident or unknown owners, §§11-17-33, 11-17-34.

REMAINDERMAN.
Ejectment.
  Appeals, §11-19-13.
  Parities, §11-19-11.

REMITTITUR.
Authority to impose, §11-1-55.
Release of excess by plaintiff, §11-1-21.

REMOVAL OF CLOUDS ON TITLE, §§11-17-1 to 11-17-37.

RENT.
Crops growing on land, §11-19-87.
Forcible entry and detainer.
  County courts, §11-25-111.
  Justice courts, §11-25-21.

REPLEVIN.
Justice courts.
  Proceedings in replevin, §11-9-135.
Perishable commodities.
  Seizure by legal process, §§11-1-43 to 11-1-49.

REPORTS.
Chancery courts.
  Sale of realty under decrees, §§11-5-103, 11-5-107.
Partition of realty.
  Masters, §11-21-25.

RESIDENTIAL LANDLORD AND TENANT ACT.
Eviction.
  Forcible entry and detainer, §§11-25-1 to 11-25-119.

RES JUDICATA.
Justice courts.
  Judgment on merits, §11-9-137.

REVERSIONERS.
Ejectment.
  Appeals, §11-19-13.
  Parities, §11-19-11.

S

SALES.
Implied warranties.
  No limitation of remedies or disclaimer of liability in sale to consumer, §11-7-18.
Punitive damages, §11-1-65.
Warranties.
  Implied warranties.
    No limitation of remedies or disclaimer of liability in sale to consumer, §11-7-18.

SCIRE FACIAS.
Circuit courts.
  Revival of judgments, §11-7-201.
Justice courts.
  Defaulting witness, §11-9-119.

SEDUCTION.
Civil action for seduction, §11-7-9.
Female child under eighteen years of age.
  Parent's action for seduction of daughter, §11-7-11.
Parent and child.
  Action for seduction of child, §11-7-11.
Unmarried female may sue for, §11-7-9.

SEIZURE.
Partition of personalty.
  County court or justice court.
    Writ to seize property, §11-21-77.
Perishable commodities.
  Seizure by legal process, §§11-1-43 to 11-1-49.

SEQUESTRATION, WRIT OF.
Fraudulent conveyances.
  Chancery courts, issuance, §11-5-75.
Perishable commodities.
  Seizure by legal process, §§11-1-43 to 11-1-49.

SERVICE OF NOTICE, PROCESS AND OTHER PAPERS.
Arbitration, §11-15-15.
  Construction contracts.
    Application and notice, §11-15-127.
  Notice to parties of hearing by arbitrators, §11-15-7.
Justice courts.
  Appointment of persons to execute process, §11-9-109.
    Delivery of property and process to clerk's office, §11-9-111.
  Sheriff or constable, §11-9-107.
    Return of process by, §11-9-113.
Subpoena duces tecum, §11-1-51.

SETOFFS AND RECOUPMENT.
Balance of mutual dealings on death of one party, §11-7-67.
Choses in action.
  Assignee may sue.
    Setoff or other defense not prejudiced, §11-7-5.
Justice courts.
  Filing of setoff on return day before trial, §11-9-125.

SHERIFFS.
Chancery courts.
  Execution of decrees, §11-5-83.
Circuit courts.
  Execution for fines, penalties and forfeitures, §§11-7-217 to 11-7-221.
  Jury.
    Officers not to converse with jurors, §11-7-149.
Interpleader.
  Third-party proceedings applicable to officers, §11-23-3.
Justice courts.
  Service of process, §11-9-107.
    Return of process, §11-9-113.

SISTERS.
Wrongful death, §11-7-13.

SMALL CLAIMS COURT.
Justice courts generally, §§11-9-101 to 11-9-147.

STALKING.
Court costs related to filing seeking injunctive relief.
  Assessment to perpetrator, exception, frivolous request, §11-13-41.
Fees related to filing seeking injunctive relief.
  Victim exempt, §11-13-41.

STATE BOARD OF HEALTH.
Actions against board.
  Venue, §11-11-15.
Venue of actions against, §11-11-15.

STATE OF MISSISSIPPI.
Injunctions.
  Security not to be required of state, §11-13-9.

STATUTE OF LIMITATIONS.
Forcible entry and detainer.
  County court, §§11-25-101, 11-25-103.
  Justice courts, §§11-25-1, 11-25-3.

STAYS.
Arbitration.
  Construction contracts, §11-15-105.
Bonds, surety.
  Injunction to stay proceedings at law, §11-13-3.
Foreign judgments.
  Interstate enforcement.
    Stay of execution on appeal, §11-7-307.
Interpleader.
  Execution stayed for value of property claimed, §11-23-9.
Justice courts.
  Execution of judgments, §11-9-139.
    Effect of stay, §11-9-141.

STRICT LIABILITY.
Privity.
  Unnecessary to maintain actions brought on account of strict liability, §11-7-20.
Wrongful death.
  Assertion of claim, §11-7-13.

SUBPOENAS.
Arbitration.
  Construction contracts, §11-15-117.
  Legal process for witnesses, §11-15-13.
    Disobedience as contempt, §11-15-17.
Forcible entry and detainer.
  Justice court witnesses, §11-25-13.
Justice courts.
  Witnesses, §11-9-115.
    Forcible entry and detainer, §11-25-13.

SUBPOENAS DUCES TECUM, §11-1-51.

SUMMONS.
Justice courts.
  Issuance by clerk of court, §11-9-105.

SUPERSEDEAS.
Supreme court of Mississippi.
  Discharge of supersedeas.
    Motion in certain cases, §11-3-21.
  Dismissal of supersedeas.
    Effect, §11-3-15.
  Exception to bond, §11-3-33.
  Judgment on bond for supersedeas, §11-3-27.
  Motion to discharge supersedeas, §11-3-21.
  Sufficiency of bond may excepted to, §11-3-33.

SUPREME COURT OF MISSISSIPPI.
Appeals to supreme court.
  Affirmance of judgment.
    Affirmed in part and reversed in part, §11-3-39.
    Enforcement duties of clerk below, §11-3-31.
  Ascertainment of damages.
    Copy of opinion certified to court below, §11-3-43.
  Certification of judgment to court below, §11-3-41.
    Duties of clerk of court below as to enforcement, §11-3-31.
  Costs.
    Collection of court costs, §11-3-41.
  Cure of defects and irregularities by amendment, §11-3-5.
  Damages.
    Judgments affirmed in part and reversed in part, §11-3-39.
  Dismissal of appeals.
    Effect, §11-3-15.
    Grounds for which appeals not to be dismissed, §11-3-5.
    Voluntary dismissal, §11-3-11.
  Dismissal of judgment, sentence or decree.
    Remand, §11-3-7.
  Error as to another.
    Appellant not entitled to reversal for, §11-3-37.
  Jurisdiction.
    Want of jurisdiction, appeals not dismissed for, §§11-3-5, 11-3-9.
  Multiple parties.
    Appellant not entitled to reversal for error to another, §11-3-37.
  Records.
    Defects, non-reversible errors, §11-3-35.

SUPREME COURT OF MISSISSIPPI —Cont'd

Appeals to supreme court —Cont'd
- Reversal of judgment, sentence or decree.
  - Affirmance of judgment in part and reversal in part, §11-3-39.
  - Copy of opinion certified to court below, §11-3-43.
  - Errors for which judgment not to be reversed, §11-3-35.
  - No reversal for want of jurisdiction, §11-3-9.
  - Not to be reversed for error as to one other than appellant, §11-3-37.
  - Rendition of judgment, sentence or decree, §11-3-7.
- Time.
  - Cases in which appeals returnable at any time, §11-3-3.
- Voluntary dismissal of appeal, §11-3-11.
- Want of jurisdiction.
  - Grounds for which appeal not to be dismissed for want of jurisdiction, §11-3-5.
  - No reversal or annulment for, §11-3-9.

Costs.
- Appeals to supreme court.
  - Collection of court costs, §11-3-41.

Damages.
- Appeals to supreme court.
  - Judgments affirmed in part and reversed in part, §11-3-39.

Decree not entered within required time in circuit courts.
- Right of appeal to supreme court, §11-1-17.

Jurisdiction.
- Want of jurisdiction.
  - Judgment or decree not to be reversed or annulled for, §§11-3-5, 11-3-9.

Records.
- Appeals to supreme court.
  - Defects, non-reversible error, §11-3-35.

Remands.
- Copy of opinion certified to court below, §11-3-43.

Supersedeas.
- Discharge of supersedeas.
  - Motion in certain cases, §11-3-21.

SUPREME COURT OF MISSISSIPPI —Cont'd

Supersedeas —Cont'd
- Dismissal of supersedeas.
  - Effect, §11-3-15.
- Exception to bond, §11-3-33.
- Judgment on bond for supersedeas, §11-3-27.
- Motion to discharge supersedeas, §11-3-21.
- Sufficiency of bond may excepted to, §11-3-33.

SURVEYS AND SURVEYORS.

Arbitration of contracts, §§11-15-101 to 11-15-143.

Ejectment.
- Either party may have survey made, §11-19-55.

Partition of realty, §11-21-19.

SURVIVAL OF ACTIONS.

Ejectment.
- Action not abated by death, §11-19-57.

T

TAXATION.

Collection of taxes.
- Injunction to restrain collection of taxes, §§11-13-11 to 11-13-17.

Injunctions.
- Restraint of collection of taxes, §§11-13-11 to 11-13-17.

TENANTS IN COMMON.

Partition of realty generally, §§11-21-1 to 11-21-45.

THEFT.

Adult protective services.
- Person stealing property of vulnerable adult.
  - Award of damages in civil action, §11-7-165.

THIRD-PARTY CLAIMS.

Interpleader, §§11-23-1 to 11-23-29.

Trial of right of property, §§11-23-1 to 11-23-29.

TIME.

Bench trials.
- Civil actions, §11-1-18.

TITLE.

Clouds on title.
- Removing, §§11-17-1 to 11-17-37.

TITLE —Cont'd
Confirmation of real estate title.
  State land patents, §§11-17-3 to 11-17-17.
  Title or interest granted by political subdivision, §§11-17-19 to 11-17-29.
  Venue of suit, §11-5-1.
Ejectment.
  Expiration of title of plaintiff, §11-19-81.
  Right to discover details of claim or title to premises, §11-19-53.
Partition of realty.
  Controverted title and all equities disposed of, §11-21-9.
Quieting title, §§11-17-1 to 11-17-37.
Suits to confirm title or interest.
  General provisions, §§11-17-1 to 11-17-37.

TORTS.
Assumption of risk.
  Doctrine abolished as to employee when master is negligent, §11-7-19.

TRESPASS.
Justice courts.
  Disclaiming title and tendering of amends in action for trespass, §11-7-73.
Venue, §11-11-3.

TRIAL.
Assignment of cases for trial.
  Responsive pleading required, §11-1-56.
Interpleader, §§11-23-1 to 11-23-29.
Justice courts, §11-9-127.
  Forcible entry and detainer, §11-25-19.
    Holding court for trial, §11-25-17.
  Jury trial, §§11-9-143 to 11-9-147.
Property claims.
  Trial of right to property, §§11-23-1 to 11-23-29.
Right to property, §§11-23-1 to 11-23-29.
Third-party claims.
  Interpleader, §§11-23-1 to 11-23-29.
Venue, §§11-11-1 to 11-11-59.

TRIAL OF RIGHT OF PROPERTY, §§11-23-1 to 11-23-29.

U

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS, §§11-7-301 to 11-7-309.

UNLAWFUL ENTRY AND DETAINER.
General provisions, §§11-25-1 to 11-25-119.

UNSAFE MACHINERY.
Wrongful death, §11-7-13.

UNSOUND MIND.
Actions.
  Answer not required in response, §11-5-49.

USURY.
Confession of judgment.
  Absolutely void if tainted with, §11-7-185.

V

VENUE, §§11-11-1 to 11-11-59.
Applicability of provisions to all courts, §§11-1-57, 11-11-1.
Arbitration.
  Construction contracts, §11-15-131.
Chancery courts, §11-5-1.
  Change of venue in jury cases, §11-5-5.
  Partition of realty, §11-21-3.
Change of venue.
  Applicability of provisions.
    Districts in county, §11-11-59.
  Chancery courts.
    Jury cases, §11-5-5.
  Districts within county.
    Applicability of provisions to, §11-11-59.
  Entry of cause, §11-11-55.
  Grounds, §11-11-51.
  Harrison county.
    Change of venue between judicial districts, §11-1-53.
  Improper county.
    Transfer of action to proper county, §11-11-3.
  Interpleader, §11-23-23.
  Justice court with jurisdiction of subject matter but not venue, §11-11-17.

VENUE —Cont'd
Change of venue —Cont'd
  Number of changes.
    Venue to be changed but once, §11-11-57.
  Power of court to award, §11-11-51.
  Prejudice.
    Grounds for change, §11-11-51.
  Transmission of papers, §11-11-53.
    Receipt of transmitted papers, §11-11-55.
Conflicts of interest.
  Judge interested, §11-11-19.
County courts, §11-9-3.
  Commencement of civil actions generally, §11-11-3.
Executors and administrators.
  Actions against executors and administrators, §11-11-9.
Harrison county.
  Change of venue between judicial districts, §11-1-53.
Interpleader.
  Change of venue in certain cases, §11-23-23.
Justice courts, §§11-9-101, 11-9-103.
  Court with jurisdiction of subject matter but not venue, §11-11-17.
Nonresidents, §11-11-3.
Partition of realty.
  Judgment of chancery court, §11-21-3.
Quieting title.
  Confirmation of state land patents, §11-17-3.
  Confirmation of title or interest granted by political subdivision, §11-17-19.
Scope of provisions.
  Applicability to all courts, §11-11-1.
State board of medical licensure.
  Actions against, §11-11-15.

VERDICTS.
Circuit courts.
  Defective verdict.
    Reformed at the bar, §11-7-159.
  Form.
    No special form required, §11-7-157.
  Further jury deliberations if verdict not responsive, §11-7-161.
  Informal verdict.
    Reformed at the bar, §11-7-159.
  Omissions.
    Certain omissions not error, §11-7-163.

VESSELS.
Wrongful death, §11-7-175.

VULNERABLE PERSONS.
Damages in civil action.
  Person stealing, embezzling, extorting or converting property of vulnerable adult, §11-7-165.

W

WARRANTIES.
Circuit courts.
  Privity unnecessary to maintain actions brought on account of breach of warranty, §11-7-20.
Disclaimer of liability.
  Fitness for a particular purpose, implied warranty of, §11-7-18.
  Merchantability, implied warranty of, §11-7-18.
Implied warranties.
  Limitation of remedies or disclaimer of liability as to certain implied warranties prohibited, §11-7-18.
Privity.
  Unnecessary to maintain actions brought on account of breach of warranty, §11-7-20.
Wrongful death.
  Breach of warranty, §11-7-13.

WITNESSES.
Arbitration.
  Construction contracts, §11-15-117.
  Legal process for witnesses, §11-15-13.
    Disobedience as contempt, §11-15-17.
  Swearing of witnesses, §11-15-13.
Forcible entry and detainer.
  Justice courts.
    Depositions, §11-25-15.
    Process to bring witnesses before court, §11-25-17.
    Subpoenas, §11-25-13.
Justice courts.
  Defaulting witnesses.
    Attachment for witness, §11-9-121.
    Entry of final judgment, §11-9-123.
    Judgment nisi against, §11-9-117.
    Scire facias, §11-9-119.
  Forcible entry and detainer.
    Depositions, §11-25-15.
    Process to bring witnesses before court, §11-25-17.
    Subpoenas, §11-25-13.

WITNESSES —Cont'd
Justice courts —Cont'd
  Subpoenas, §11-9-115.
    Forcible entry and detainer, §11-25-13.
Malpractice.
  Medical malpractice.
    Certificate of consultation to be filed with complaint, §11-1-58.
    Expert witness in action against physician, §11-1-61.

WRITS.
Chancery courts.
  Clerk to issue certain writs, §11-5-83.
  Fraudulent conveyances.
    Issuance of writ of sequestration or injunction or both, §11-5-75.
County courts.
  Return of writs.
    Writ returnable to justice court, general or special, or circuit or chancery court may be made returnable to county court, §11-9-1.

WRONGFUL DEATH.
Boats and watercraft, §11-7-175.
Circuit courts.
  Actions for injuries producing death, §11-7-13.
Contributory negligence.
  No bar to recovery of damages, §11-7-15.
Damages.
  Circuit courts, §11-7-13.
Distribution of damage award, §11-7-13.
Negligence.
  Actions for injuries producing death generally, §11-7-13.
  Contributory negligence no bar to recovery, §11-7-15.
Persons entitled to recover, §11-7-13.
Persons entitled to sue, §11-7-13.
Ships and vessels, §11-7-175.